Centre for Constitutional Studies

CONSTITUTIONAL FORUM CONSTITUTIONNEL

Volume 3, Number 3 Edmonton, Alberta Winter 1992

PERSPECTIVES ON "SHAPING CANADA'S FUTURE TOGETHER"

Centre d'études constitutionnelles

CONSTITUTIONAL FORUM CONSTITUTIONNEL

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Alberta Law Foundation

Constitutional **Forum** Constitutionnel is the newsletter of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

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Constitutional **FORUM** Constitutionnel is indexed in: **Index to Canadian Legal Periodical Literature.**

ISSN: 0847-3889

CONSTITUTIONAL STRATEGIES

SHAPING WHAT FUTURE FOR CANADA?

A prospective analysis of the federal government's constitutional proposals

Claude Denis

INTRODUCTION

The federal government introduced on 24 September 1991 its proposals for solving Canada's constitutional crisis. It is this document, entitled *Shaping Canada's Future Together*, that has since then organized constitutional discussions. It will continue to do so in the coming months, and it is on its ability to generate a consensus that 'Canadian unity' depends in the medium term, if not forever.

In this paper, I want to assess *Shaping Canada*'s chances of generating such a consensus — regardless of what I might consider its substantive merits and flaws. This analysis was first outlined for a panel discussion, two days after the federal proposals were made public; it was based on the text of the proposals themselves, the Prime minister's speech in the House of Commons introducing them, and on the initial reactions of Robert Bourassa, Clyde Wells and Ovide Mercredi.[1] As my luck would have it, nothing has happened since then to disqualify my claims.

1. The structure of the federal proposals

Contrary to the failed Meech Lake Accord (MLA), which was ostensibly a 'Québec round' of negotiations, the current proposals present themselves as a 'Canada round'. And yet, the general thrust of MLA was to change the power balance between all provinces and the federal government and make all subsequent reform more difficult. Today's 'Canada round', on the other hand, is severely constrained by the Québec-imposed deadline of a referendum in the fall of 1992.

Meech was focused on Québec as a distinct society, but the debate that derailed it has made front-line issues of Senate reform and aboriginal self-government. These three issues remain at the heart of constitutional discussions, to which the federal proposals have added a fourth one that could be called 'child of free trade' — a set of proposals on the 'economic union' and on the protection of property rights. These are the four axes around which *Shaping Canada's Future Together* turns.

A fifth axis, the object of much talk in recent months, has been excluded: a social charter, desired by the federal New Democratic Party and the government of Ontario, evoked positively by Joe Clark in mid-September and popular among Canadians.[2] Other issues and constituencies are more or less ignored, such as a reconsideration of official bilingualism (which had been proposed by the Spicer Commission's report) and a strengthening of the Charter of Rights' gender equality provisions.

2. Strategy, Part 1: Settling Meech

I now want to analyze the federal proposals as a 'compromise machine' — although the phrase 'war machine' would be a better fit, especially with respect to its designs on Québec's independence movement. To do so, I will adopt three assumptions on the character of these proposals:

1) The text that we have in hand is the fruit of a deliberate strategy and, as such, it is well thought out;

2) The proposals are negotiable: the federal government does not give away everything that it is willing to give, and it asks for more than it is willing to settle for;

3) The document as a whole has been constructed in such a way as to allow negotiations to produce an accord.

In these strategic terms, *Shaping Canada's Future Together* strikes me as a masterful document — a deadly war machine. I would wager that it indeed will produce an accord acceptable to the governments of Québec, Canada, and of a strong majority of provinces. But there remains one large unknown factor which could derail such a deal: public opinion in English-speaking Canada.

The first crucial element of *Shaping Canada* is that it goes a long way toward solving two of MLA's key issues: Québec's demands and a reformed Senate.[3] The second key element of the proposals is that the economic axis at once appeals to Canadians' dissatisfaction with

the perceived economic inefficiency of federalism *and* makes proposals that are seen by many as outrageous. The combined impact of these two gambits is to draw most criticism toward the inflammatory parts of the economic axis (protection of property rights, the federal 'power grab' through a revamped article 91 of the *Constitution Act, 1867*), while allowing the important players — namely Robert Bourassa and Clyde Wells — to focus on Meech's deal breakers.

The proposed reformed Senate[4] comes close to satisfying Don Getty and, more importantly, Clyde Wells, all the while protecting Québec's minority interest in the federal institutions. And, the distinct society clause is restricted (by being defined) so as to allay Wells' concerns, *and* multiplied (by being both in the Charter and the Canada Clause) and reflected in the character of senate reform — giving Bourassa something to build on.

In time (i.e. before March 1992), and with full federal cooperation, Bourassa and Wells will fine-tune these aspects of the proposals according to their needs and with a view to appeasing their respective constituencies' fear and hostily. They will then get on with the business of selling the accord. In this respect, Clyde Wells is emerging as the federal government's secret weapon in the struggle for the assent of the population of English-speaking Canada — a huge irony in the aftermath of the Meech fiasco. But, besides the issue of the length of Wells' coattails, difficulties will remain. First among them, Meech's third issue: aboriginal self-government.

Native people are looking for recognition of their inherent right to self-government; *Shaping Canada* offers them only a general right to self-government, and declares that it would still be subject to the Charter of Rights and to federal and provincial laws. The proposals have managed to split native organizations, but the most important among them, the Assembly of First Nations (AFN), has been outspoken in its rejection of the document through the voice of its national chief Ovide Mercredi.

Even Mercredi's angry words, however, hinted at the possibility of compromise. On the very day of the proposals' unveiling, he called them a betrayal and wondered whether it was worth participating in the coming discussions. The next day, still furious, his discourse on *Shaping Canada* shifted notably: "If we accept it as it is, we dishonour ourselves"; he added that the AFN remained willing to negotiate.[5] As Mercredi knew quite well, the First Nations need not "accept it as it is" for *Shaping Canada* was intended by the federal government to be modified.

But, let us assume the worst case scenario on the self-government issue. And, suppose that the Québec and Senate issues were resolved. Quite independent of matters of fundamental justice, how believable is it that a last-chance constitutional accord would be allowed to founder on the rocks of native self-government? Not very, I would think.

Indeed, it is worth remembering — or realizing — that the Meech Lake Accord *did not* fail because of Elijah Harper's actions. Rather, it died over a period of eighteen months, the victim of a constellation of elements where 'distinct society' was absolutely dominant. Harper, instantly transformed into the archetypal Indian, was then offered a strange symbolic job, that of a glorified grave-digger.

In the current round of talks, the First Nations could yet be left out, paying the price for the salvation of a country that is stepping back, terrified, from the abyss of break-up. In this scenario, the Oka crisis could become the prototype of an angry native reaction, but pressure would also be higher than ever for governments to deal fairly with the First Nations.

Mercredi's early openings, however, combined with the divisions among native organizations, increase the likelihood that Native leaders will indeed be working hard for a deal.[6] The book would then be closed on Meech Lake and its fall-out.

3. Strategy, Part 2: 'Child of free trade' as bait and prize

Before the federal government unveiled its proposals, it was taken for granted by all observers that they would deal with Québec, the Senate, and aboriginal self-government. But, the economic axis caught most by surprise.

In his speech to the House of Commons outlining his government's document, the Prime minister made sure to frontload his remarks with a most unexpected and controversial proposal: the protection of property rights in the Charter. This was a sure-fire way to draw everyone's attention to the economic agenda, which immediately became the target of choice for Québec's independentist leaders and English-speaking Canada's left-nationalists.

Meanwhile, the social agenda was being excluded, contrary to the expectations raised by Joe Clark's remarks in the preceding weeks. On the Left-Right axis of Canadian politics, the combination of property rights (and free circulation of capital) and social charter created a situation ripe for a trade-off: in all likelihood, both would be included in a final proposal, or both would be

excluded. Faced with an NDP government in Ontario and with the prospect of two more in B.C. and Saskatchewan (which have now materialized), the federal government was thus launching a pre-emptive strike that ensured it of at least a draw.

In Québec, the independentist reaction to the economic union proposals was immediate: Brian Mulroney's speech was barely finished when Bloc Québécois (BQ) leader Lucien Bouchard was claiming that this — especially the proposed article 91A — was an unprecedented attack against Québec. Parti Québécois (PQ) leader Jacques Parizeau soon concurred.

Robert Bourassa, on the other hand, kept quiet for twenty-four hours. He then held a press conference, and pronounced himself dissatisfied with certain aspects of the project of economic union; he was pleased, however, with the proposed devolution of powers on culture, immigration and manpower (sic). The next morning, 26 September 1991, *The Globe and Mail*'s banner headline read "Bourassa rejects economic plan".

Given Bourassa's ardent desire to reach a constitutional accommodation, one would think that he would have been troubled by the attacks against *Shaping Canada* and by his own lukewarm reaction to the document. Yet, he was in a very sunny mood at that press conference, joking and teasing journalists eager for some incendiary declaration. This was a man in control, who knew where he was going, comfortable with his position. Since then, he has done very little to defend the proposals, while the PQ and BQ attacks have continued. In a predictable response to this unanswered stream of criticism, Québec public opinion has turned against the federal proposals, but without rallying unambiguously to the sovereignist option.[7]

In the PQ's eyes, the federal proposals are as good as dead. Indeed, the PQ is so confident that *Shaping Canada* is a non-starter that it has refocused its attacks against the Bourassa government on the Liberals' economic performance.[8] This is a quite remarkable development: faced with what is probably the ultimate effort of Canadian federalism, the PQ has declared victory, and has begun to look elsewhere, several months before the end of the game.

Is that it, then? Is the game up and Québec on the threshold of independence? Quite the contrary, I would argue. It seems, rather, that the independentists have bitten into a large bait set for them by Brian Mulroney and Robert Bourassa.

From the federalist point of view, this economic bait has at least two important virtues: it takes the fish's attention away from its usual prey, the weakened 'distinct society' clause, and it neutralizes the PQ's own reassuring appeal to an economic association meant to accompany political sovereignty.

In this sense, the free reign allowed by Bourassa to the PQ-BQ's attacks can be understood as the fishing line's free unreeling before the angler's tug. Bourassa and Mulroney, then, are waiting for the right moment — March '92 — to pull on the line. If I may mix metaphors, the federal government, with Robert Bourassa happily looking on, has given the PQ-BQ the rope with which to hang themselves.

It is important to repeat how much the PQ-BQ's attacks have been directed at the economic union proposals, while the supposedly lame-duck 'distinct society' clause has been largely neglected. Thus, both Jacques Parizeau and Lucien Bouchard have made much of the proposals' perceived threat to 'Québec Inc.' in general and, in particular, to the Caisse de dépot and the Mouvement Desjardins.

In this connection, I should like to quote another, slightly older, set of constitutional proposals:

> One of the goals of Canadian federalism has been to create a common market, a strong national economy. Yet, it is well known that the economic integration of Canada is a goal that remains to be completed. Obstacles to commerce are still numerous and they impede, each in its own way, our economic performance.

And:

> Canadian legislatures must renounce putting up restrictions to the free circulation of persons, products and capital. In this time of trade globalization and market internationalization, all barriers to the movement of productive resources within Canada's economic space must be eliminated.[9]

The document I am quoting from is not some centralizing federal document, but, rather, the very nationalist Allaire Report of the Parti libéral du Québec (PLQ) (in my own translation). These economic proposals had gone almost unnoticed by observers in English-speaking Canada, so traumatized were they by its sweeping demand of political autonomy by means of the 'patriation' of 22 jurisdictions.

The nationalism of the PLQ, like that of the PQ, is indeed strongly free-trade — as the quasi-unanimity of Québec's elites in favour of the Canada-U.S. free trade

agreement eloquently demonstrated. The PLQ is thus looking to strengthen, within Canada, the political economic regime already established between Canada and the United States.

It is none other than this economic project that is being promoted by the federal proposals... with a few important additions: protection of the right to property (already entrenched in the Québec Charter) and, most of all, article 91A, giving exclusive jurisdiciton to the federal government "in relation to all matters that it declares to be for the efficient functioning of the economic union."[10]

It is of course this latter clause (with some help from article 121, aiming to broaden the common market) which triggered the ire of the independentists and caused Bourassa to claim dissatisfaction with the economic union proposal. It must be recognized, however, that with the exception of 91A, the economic philosophies of the Allaire Report and *Shaping Canada* are very close relatives indeed. This is why the economic union is, for the federal Conservatives and Québec's Liberals, at once the bait and the prize: article 91A is the bait, the elimination of barriers to the circulation of capital is the prize.

Now that the combination of PQ-BQ attacks and Bourassa's relative silence has established, in Québec, that what is deeply unacceptable in the federal proposals is the economic union — or rather, the aspect of the union embodied in 91A — federal strategists stand poised to give a good pull to their fishing line: surrendering (!) to PQ-BQ criticism, they will abandon 91A (and probably transfer to the Council of the Federation the jurisdiction just abandoned by the federal government), thereby taking away their chief target. The PQ-BQ will have won... and lost.

Conclusion: What does English-speaking Canada want?

It may seem strange, but, although it is Québec that is giving Canada an ultimatum, the main obstacle to reaching an accord is not Québec, but 'the rest of Canada'. Indeed, the main thing to keep in mind in these tense times is that most Québecers badly want to find an accommodation with Canada, while it is not at all clear whether most English-speaking Canadians are willing to negotiate.

In these twin respects, the federal strategy has some quite remarkable features: on the one hand, it exhibits a sophisticated sense of how to play the political game in Québec, namely, of how to neutralize the Parti Québécois and the Bloc Québécois; on the other hand, except in its attempt to neutralize the left's social charter project, it essentially depends on a leap of faith in its approach to English-speaking Canada.

This leap of faith — the second one in the life of the Mulroney government — can nonetheless rely on a number of assets: the presence in the proposals of gains for many constituencies; the acceptance by Clyde Wells, the ultimate Captain Canada, of an altered 'distinct society' clause; the focus of debate on the economic union; constitutional fatigue among many Canadians, which leaves politicians more elbow room than might have been expected; and, perhaps most importantly, the fear of seeing the country shatter and become more americanized.

In the end, the key question remains as it emerged in the Meech Lake and Free Trade debates: what does English-speaking Canada want? And, because of this, it will be now as it was with the Meech Lake Accord, an eventual deal breaker will not come from Québec extremism: if it comes, it will be from English-speaking Canada's rejection of Québec's claim to difference.

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1. Respectively, the Premiers of Québec and Newfoundland and the national chief of the Assembly of First Nations.
2. On this last point, see a CTV opinion poll, 14 October 1991.
3. The third issue — aboriginal self-government — is more thorny but not altogether hopeless; more on this below.
4. In the widely accepted Albertan terms of a 'triple E' senate, the Upper House should be elected, effective and equal (that is to say, be composed of an equal number of members from all provinces). The federal proposals offer an elected senate (the first 'E'), with veto powers on certain areas of legislation but with no legislative role regarding money bills (this counts as no more than half the second 'E') and with more equitable representation (half the third 'E'). Senate votes on cultural matters would also require a double linguistic majority, thus protecting Québec's interests.
5. "Mercredi charges proposals 'betrayal' of native people", *Globe and Mail* (25 September 1991); CBC's *The National*, 25 September; "Indians skeptical of federal promise on self-government", *Globe and Mail* (26 September 1991).
6. Developments a month after the initial salvoes confirm this assessment. See for instance: "Natives, Ottawa both give ground", *Globe and Mail* (2 November 1991).
7. See the *Globe and Mail*-CBC News opinion poll of 4 November 1991.
8. "PQ strategy: Tap public anger at Liberal regime", *Globe & Mail*, (8 October 1991); and "PQ targets economy as Liberal weak spot", *Globe & Mail*, (9 October 1991).
9. *Un Québec libre de ses choix*, Rapport du Comité constitutionnel du Parti libéral du Québec. Pour dépot au 25e Congrès des membres, 28 janvier 1991, pp.16, 41.
10. *Shaping Together Canada's Future*, 56.

LIVING IN A MATERIAL WORLD: PROPERTY RIGHTS IN THE CHARTER

Richard W. Bauman

The federal government's proposals in *Shaping Canada's Future Together* suggest an amendment to our constitution that would provide a "guarantee of a right to property".[1] This suggestion is Delphic. It is unaccompanied by any discussion attempting to justify or elucidate this particular proposal. It remains for us to conjecture what might be the extent of such a right, where it might be placed in the *Canadian Charter of Rights and Freedoms*,[2] and why this right merits constitutional protection as a fundamental value in our society. Questions about the nature of property and how it ought to be weighed against other social instruments and ideals are fraught with economic and political controversy. The federal government has revived the issue of property rights in the current round of constitutional deliberations in Canada, even though this issue had apparently been exhausted in numerous discussions over the past two decades.

WHAT IS A RIGHT TO PROPERTY?

The discussion of the proposed right to property under the *Charter* is frustratingly spare. There is no elaboration of how to recognize property when we encounter it, or what elements or dimensions this right could conceivably include.[3] Nor do we learn about the degree of protection envisioned in the *Charter*, what problems such an entrenched right would prevent, or what kinds of government action might be circumscribed by entrenching such a right. Such failures leave a host of unanswered questions about the scope and importance that this new legal right might attain.

First, property itself is not a single, corporeal thing. It has come to be viewed as as a congeries or "bundle" of rights that the law at a given time recognizes as belonging to persons who own, possess, or use things that are capable of having property interests attach to them.[4] Property consists in rights in or to things that the law will enforce.[5] In some cases, the property right in question is a right to exclusive use or possession. In another case, it might be a right to the profits from a venture or compensation for its loss or conversion. Property rights can attach to real estate, to personal goods, to products of one's labour, to technology, to commercial enterprises, to trade names or brands, to original ideas, to images, even to a person's own body. A catalogue of property rights or "incidents" (the term favoured by A. M. Honoré)[6] would be open-ended. At law, such rights or incidents, in absolute or qualified form, are constantly being created. Not all legal systems recognize the same relations as forms of property rights.[7] A simply worded "right to property" in the *Charter* would amount to an apparently unqualified constitutional protection of an indefinite number of rights to the ownership and use of an indeterminate number of tangible and intangible things. The proposal by the federal government is impressive for its simplicity and absoluteness. Regrettably, it does not help us understand either how property rights are created, qualified, or altered by law, or the policy reasons for limiting the rights of property owners in the service of overall social welfare or the common good.

Second, a undelineated constitutionally protected right to property is liable to cause confusion. For example, it should not be interpreted as a constitutionally protected right to acquire or own some minimal amount of property. This is a possible, though implausible, interpretation of a guaranteed right to property. The more likely purpose of any property right added to the *Charter* would be to protect those persons who already have or will obtain property against depredations by government.[8] It would not be instrumentally useful as a legal guarantee to persons who are propertyless. To borrow the language used by Frank Michelman, property rights in a constitutional setting usually provide for a "derivative", rather than a "direct", right.[9] A constitution does not provide some kind of private entitlement that *must* be established and maintained in the general laws of the country. Rather, the derivative right attaches only to:

> such instances of entitlement as happen to arise, under such standing laws as do happen to provide for them, protecting these contingent but actual entitlement relations against certain kinds of governmental impairment.[10]

Third, while the debate around property rights typically is illustrated by references to real estate, it is arguable that a broad range of different economic rights or advantages may be construed as a type of property that is recognized under an amended *Charter*. For

example, any attempt by a legislature to impose a regulatory regime on an industrial sector, such as the exploration for valuable minerals, could be construed as an interference with an enterprise's property rights. On this interpretation, an aggrieved corporation could bring a *Charter* action to have a court declare invalid the offending legislative act.[11]

EXISTING CONSTITUTIONAL PROTECTION OF PROPERTY IN CANADA

The *Canadian Bill of Rights*, enacted originally in 1960, contains specific protection for property.[12] It provides in s. 1(a) a right to the "enjoyment of property" and the right not to be deprived of it "except by due process of law". This measure closely resembles the due process clause contained in both the Fifth and the Fourteenth amendments of the U. S. Constitution.[13]

A provision similar to s. 1(a) was not carried forward into the *Charter* in 1982, despite the recurrent efforts of Prime Minister Trudeau to see the entrenchment of this legal right. The matter was vigorously contested and, partly owing to the opposition of the New Democratic Party and of some provincial governments, particularly those of Saskatchewan and Prince Edward Island, the right to property was omitted from the *Charter*.[14] Subsequent attempts to introduce an entrenched right to property, initiated by resolutions in the B.C., New Brunswick, and Ontario legislatures, as well as in the House of Commons, never succeeded in gaining the requisite support before they expired.[15]

The explicit protection in the *Bill of Rights* of a right to property remains in force today. Several features make this a relatively feeble and underemployed right.[16] First, the right provided by the *Bill of Rights* is not entrenched in the sense in which legal rights contained in the *Charter* are entrenched: courts have been extremely reluctant to invalidate laws that infringe this right. Second, s. 1(a) of the *Bill of Rights* applies only to laws made by the federal Parliament. Third, s. 1 of the *Bill of Rights* refers only to "the right of the individual". This would appear to exclude as claimants all non-natural persons, such as corporations.

There have been few cases interpreting s. 1(a). It remains unclear, for example, whether the due process exception in the *Bill of Rights* should be interpreted as requiring simply a fair procedure to be followed by the government, or whether it actually guarantees compensation for owners of property who have been deprived of it. Nor is it obvious that the Supreme Court, in interpreting s. 1(a), would invariably treat the right to property as subject to a "procedural", but not a "substantive", form of due process. There have been hints in this direction, but the courts have not conclusively settled whether s. 1(a) entitles them to review an impugned law only for the propriety of the procedures that led up to its adoption, or whether they can judge the contents of the law against a standard of justice.[17] Issues such as this would become acutely relevant if the recent federal proposals led to the addition of a right to property in the *Charter*.

Property rights are also specifically protected in various provincial bills of rights. For example, the *Alberta Bill of Rights*, first enacted in 1972, recognizes every person's right to the enjoyment of property.[18]

Although a right to property was omitted from the *Charter*, this does not mean that a person's property is perennially at risk to being taken away by governmental action. The jurisdiction of each province over "property and civil rights" underpins the ability of provincial governments to expropriate private property from its owners.[19] In every Canadian jurisdiction procedural guarantees exist to ensure that the owner receives timely notice and a fair hearing before the expropriation of land can be carried out.[20] In addition, the exercise of the power of expropriation usually is accompanied by payment of adequate compensation for the property affected.[21]

Expropriation or land use regulation are among the more visible instances of an individual property-owner confronting the awesome power of the state. It should not, however, be forgotten that many of the principles developed at common law provide considerable protection of settled expectations in relation to property rights.[22] Whether the law provides protection in the form of property rules or liability rules, the point is that state action is often devoted to securing reliance interests, facilitating the transfer of private property, and resolving disputes over ownership and use.[23]

WHY DOES A RIGHT TO PROPERTY REQUIRE *CHARTER* PROTECTION?

A common starting place for justifying the inclusion of property rights in the *Charter* is the matter of Anglo-Canadian constitutional history. The *Magna Carta*, signed by King John in 1215, referred specifically to restraints on the power of the monarch to usurp the property rights of his subjects. The *Constitution Act, 1867* similarly presents an image of political legitimacy and stability that is built on the continuity and respectability of propertied legislators.[25] To include property rights in the *Charter* would only extend a time-honoured tradition.

A second source of support for entrenching property

rights is the existence of similar guarantees in major international agreements which Canada has signed. For example, the *Universal Declaration of Human Rights* includes a right not to be arbitrarily deprived of one's property.[26] The *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[27] which served as one model for the *Charter*, protects property rights in Article 1.

A third, more powerful line of argument in favour of constitutionalizing property rights derives from those political and legal theorists who have treated property as a core idea of modern liberal government. According to John Locke in the seventeenth century, the foundation of political societies can be traced to the need to protect established property interests.[28] The just acquisition of property by an individual is a primary activity that Locke thinks governments must respect, even if it took place in a pre-political era. Without settled entitlements, government would be neither desirable nor possible. On this view, property rights, largely based on appropriation in a pre-market setting, become the paradigm of all legal rights in a society.[29] The *Charter*, as we have it today, is devoted to the ideal that individuals should be autonomous moral creatures. Their zone of personal space, involving freedom of belief and mobility, should not suffer unwarranted government intrusion. Without the protection of constitutional guarantees, individuals and their private interests are placed at the mercy of an overweening state power that will invariably invoke the justification of a "public" use or purpose in overriding settled interests. This may be done arbitrarily or without adequate compensation. A guarantee of property rights is one means to require governments to act fairly towards its citizens.

Those who, before 1982, favoured the inclusion of a constitutionally guaranteed right to property might have assuaged their disappointment by the argument that this kind of right was implicitly contained in s. 7. From the *Charter* jurisprudence that has developed, it is now clear that the Supreme Court of Canada has rejected the idea that s. 7 of the *Charter* includes many of the economic rights traditionally associated with property.[30] This is perhaps a major reason that the debate over the need for an explicit *Charter* guarantee has been revitalized.

The extension of legal rights under the *Charter* to include the right to property can also be viewed as part of the ideological tilt that is evident in other aspects of the federal government's proposals. The economic philosophy that underlies the proposal for a more efficient, market-based economic union, with constitutional protection for business against legislative intervention, is strikingly libertarian.

WHAT MIGHT BE THE IMPACT OF ENTRENCHING PROPERTY RIGHTS?

From the perspective of those who advocate including property rights in the *Charter*, the main advantage to be gained is the added assurance that governments will be restrained from taking property without serious safeguards. The courts in Canada will be empowered to act as sentinels, always vigilant to descry state action that directly or indirectly diminishes or terminates the social or economic rights attached to a person's property. Courts are already practised in this area. According to some legal theorists, most common law adjudication, including the development of property doctrines, can best be analyzed as economic decision-making concerning the distribution of resources within a society.[31]

Though the federal proposals do not mention how property rights would interplay with the rest of the *Charter*, it should be kept in mind that those rights likely would be subject to the limitations imposed by the presence of s. 1 in the *Charter*. This saving provision, which allows the government to justify a law that otherwise infringes a legal right or freedom, would permit the courts to assess whether the infringement is "demonstrably justified in a free and democratic society".[32] It is not clear also whether the proposed property guarantee would be subject to s.33. This would permit a government to declare, for a limited period, that a law operates notwithstanding the guarantees contained in the *Charter*.

Adding property as a protected legal right in the *Charter*, in or about s. 7, could create interpretive difficulties in respect of aboriginal and treaty rights. On one hand, the added right to property could be construed as reinforcing aboriginal rights to land. On the other hand, the courts in Canada are still reluctant to characterize aboriginal rights as ownership of the land in question.[24] The entrenchment of property rights would create a further constitutional barrier for establishing aboriginal title. The property rights of intervening parties would be constitutionally protected against any aboriginal claim. Perhaps we would be creating a situation in which we can forsee a clash of constitutional rights.

The opponents of a *Charter* property right have contended that many desirable types of legislation will be dangerously exposed to constitutional attack. In particular, they draw our attention to the interpretation of the due process clauses by the U.S. Supreme Court in one of its reactionary phases. For over a generation, the approach of the majority of that Court was to interpret the due process clauses as more than simply procedural limits on the deprivation of life, liberty, or property.

Instead, the Court deployed a concept of "substantive" due process and succeeded in striking down state laws providing for minimum wages, for maximum hours of work, and for sanctions against anti-union activities.[33] These measures were characterized as state interference with the right to contract or the right to use of one's own property. This trend was not reversed until 1937.[34] From time to time, there have been alarms sounded in the U.S. that the Supreme Court could relapse into a *Lochner* approach.[35]

The opponents of entrenching property rights are fearful of the spectre that the Supreme Court of Canada will ultimately adopt an approach involving a review of the substantive content of legislation.[36] Among the programs and policies that might be at risk under an entrenched property right are the following: rent control legislation; minimum wage and pay equity plans; occupational health and safety regulation; matrimonial property regimes that provide for the division of property on separation or divorce; environmental controls; and natural resource management schemes.

CONCLUSION

This modest discussion is intended to provide some oracular guidance on the ambit and effect of an entrenched right to property. Much more discussion is required before we can fully understand the public policy advantages and costs of enshrining property as a category of constitutional protection. As this discussion has sought to demonstrate, we have still to investigate thoroughly the nature and range of the interests and parties that might benefit from constitutional recognition. We can be sure that rights associated with property are in constant evolution. They will reflect the contingent, particular background political morality on which legislators and judges base their work.[37] Placing property rights under the protection of our constitution will require judges and lawyers to construct tests to determine when there has been a deprivation of property outside the procedural or substantive requirements that might be set down in the *Charter*. The activity of developing and applying different kinds of tests or standards has given rise to a considerable body of constitutional doctrine in the U.S.[38] It also has stimulated academic controversy whether the resulting body of doctrine is coherent or principled.[39]

Finally, it should be recognized that, at a theoretical level, constitutional entrenchment of property rights can be used to achieve contrasting purposes. Some theorists would argue that this form of constitutional protection should be used to shield the holders of entitlements against a patterned redistribution that is meant to achieve a projected form of social justice. One of the most eloquent defenders of property rights against such efforts to use the law to promote a desirable end-state pattern of property ownership is Robert Nozick.[40] He questions, for example, the legitimacy of taxation measures, which he characterizes as "on a par with forced labor".[41]

In another direction, it has been argued that the constitutional interpretation of the idea of property permits lawmakers to reconsider the justifications for and limitations on private property. Under this political and moral theory, constitutional construction of a right to property should be guided by a triad of principles. These include the principle of efficiency and utility, the principle of desert based on labour, and the principle of justice and equality.[42] This avowedly "pluralist" theory of property would both shape, and be constrained by, any constitutional doctrine that has already emerged or that would follow from an amended *Charter*.

The discussion here is cautionary. Many people will feel that respect for an important class of rights is tenuously dependent on a government's sense of fairness, which may vary from time to time. There are dangers on all sides, though, once we adopt a constitutional guarantee of property rights. The consequences are unpredictable, incalculable, and difficult to reverse. The federal proposal to entrench a right to property is an invitation to serious rethinking — from a political as well as from a legal perspective — about whether property is a fundamental value, and about the role of principles and the role of courts.

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I am grateful for the helpful comments of my colleague M.M. Litman on an earlier draft of this piece.

1. Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services Canada, 1991) 3.
2. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11.
3. One possibility would be to resort to the common understanding of what ordinary people mean by "property" when they use that term. This is the theory of meaning, credited to Ludwig Wittgenstein, that frames the analysis in Bruce A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977).
4. See Thomas C. Grey, "The Disintegration of Property" in *NOMOS XXII: Property*, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1980) 69.
5. See C. B. Macpherson, "The Meaning of Property" in *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1.
6. A. M. Honoré, "Ownership" in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961) 107.

7. See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 24-61 for an attempt to find an organizing idea that will permit one to generalize about the diversity of private property rights created in different legal systems.
8. This leaves it open to debate whether various forms of what has been termed "the new property", such as welfare benefits or unemployment insurance, would qualify for protection under a *Charter* guarantee: see Charles A. Reich, "The New Property" (1964) 73 Yale L. J. 733, Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta. L. Rev. 548, and Akhil Reed Amar, "Forty Acres and a Mule: A Republican Theory of Minimal Entitlements" (1990) 13 Harv. J. L. & Pub. Pol'y 37.
9. Frank I. Michelman, "Property as a Constitutional Right" (1981) 38 Wash. & Lee L. Rev. 1097.
10. *Ibid.* at 1099.
11. For an example, see *Rybachek* v. *U.S.*, 33 E.R.C. 1473 (1991) (U.S. Claims Court), where an Alaskan gold miner sued the federal government for financial losses incurred as a result of regulations made by the Environmental Protection Agency. This example is drawn from the Canadian Bar Association's *Rebuilding a Canadian Consensus: An Analysis of the Federal Government's Proposals for a Renewed Canada* (Ottawa, Canadian Bar Association, 1991).
12. R.S.C. 1985, App. III.
13. The Fifth Amendment, adopted in 1791, applies to federal laws and contains specific recognition of a right not to have private property taken for "public use" without "just compensation". The Fourteenth Amendment, adopted in 1868, extended the application of the right to property, subject to a due process clause, to laws made by the states.
14. For a chronology of the documents leading up to the deletion of property rights from the proposed *Charter*, see Roy Romanow, John Whyte, and Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) 216-62.
15. Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Can. J. Poli. Sci. 309.
16. For a good discussion of the enduring relevance of the *Bill of Rights* in this context, see Philip W. Augustine, "Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms" (1986) 18 U. Ottawa L. Rev. 55 at 61-66.
17. See *Curr* v. *The Queen*, [1972] S.C.R. 889.
18. R.S.A. 1980, c. A-16, s. 1(a).
19. See *Constitution Act, 1982*, s. 92(13). The federal government's power of expropriation has been found in its residual power under s. 91: see *Munro* v. *National Capital Commission*, [1966] S.C.R. 663.
20. See, e.g., *Expropriation Act*, R.S.A. 1980, c. E-16.
21. As Hogg notes, nothing in the *Charter* prohibits a taking by a provincial government without compensation, so long as an express legslative provides that no compensation is required: see Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 746n.21.
22. Note s. 26 of the *Charter*, which states that the guarantee of certain rights and freedoms "shall not be construed as denying the existence of other rights and freedoms that exist in Canada".
23. See Guido Calabresi and Douglas Malamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv. L. Rev. 1089 and Joseph William Singer, "The Reliance Interest in Property" (1988) 40 Stan. L. Rev. 611.
24. *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335.
25. See Alvaro, *supra* n. 15 at 313-14.
26. U.N.G.A. Res. 217 (III), 3 U.N. G.A.O.R. Supp. (No. 13), 71 U.N. Doc. A/810 (1948).
27. 4 Nov. 1950 (in force 3 Sep. 1953), Europ. T.S. No. 5.
28. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).
29. For a discussion of the questionable steps in Locke's theory, see Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan. L. Rev. 957. The claim that the "consolidated property right" is paradigmatic is found in Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986) at 98-99.
30. See *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*, [1985] 2 S.C.R. 486 and *Irwin Toy Limited* v. *Québec (Attorney General)*, [1989] 1 S.C.R. 927. Early *Charter* decisions such as *New Brunswick* v. *Fisherman's Wharf* (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.), which construed the right to "security" as a property right, have been criticized by academics and repudiated by subsequent courts.
31. Richard A. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown, 1986) ch. 3.
32. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
33. Some of the leading cases in this vein are *Lochner* v. *New York*, 198 U.S. 45 (1905), *Coppage* v. *Kansas*, 236 U.S. 1 (1914), *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).
34. *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937).
35. William Van Alstyne, "The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court" (1980) 43 Law & Contemp. Probs. 66.
36. For an assessment of the extent to which developed case law under the *Charter* supports the possiblity of substantive review, see Eric Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar Rev. 560.
37. For a theory of this dimension of lawmaking, especially in a constitutional context, see Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 120-45 and Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 355-99.
38. See Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1988) 567-628.
39. For contrasting views, see Richard A. Epstein, *Takings: Private Power and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Pres, 1985), Thomas C. Grey, "The Malthusian Constitution" (1986) U. Mia. L. Rev. 21, and Frank I. Michelman, "Takings, 1987" (1988) 88 Colum. L. Rev. 1600.
40. See *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 167-74.
41. *Ibid.* at 169.
42. For a detailed portrait of this theory, and some indications how it would work in relation to typical "takings" cases, see Stephen Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) esp. 442-69.

DISTINCT SOCIETY

FEARFUL SYMMETRY: CONSTITUTIONAL UNIFORMITY AND THE FEDERAL AMENDMENT PROPOSALS

Dale Gibson

There is a dangerous misconception afoot that constitutions have to be symmetrical. It is said that any acceptable solution to Canada's current constitutional troubles will have to treat every province just like every other province. That is nonsense, and because it threatens to interfere with effective constitutional negotiations, it is perilous nonsense.

Canadian federalism has never been symmetrical. The original 1867 Constitution openly recognized the distinctiveness of every province in many different respects. Section 133 imposed an obligation on Québec to preserve the use of English in the Legislature, the courts and the laws of the province, though there was no equivalent requirement for the other provinces to protect the use of French. Several special financial concessions were made to New Brunswick and Nova Scotia that were not available to Ontario or Québec (sections 114-6, 119, 124). Probate Courts in the Maritime provinces were to be treated differently than equivalent courts in other provinces (section 96), and a provision that contemplated uniform provincial laws (section 94) was applicable to the common law provinces only. Numerous other provisions treated the several provinces distinctively in various minor respects (sections 22, 23(6), 37, 40, 51, 63-4, 69 and 80).

In addition to those patent distinctions between provinces in the original document, there was also an important *latent* difference. Section 93 guaranteed the educational rights of denominational school adherents in every province, but because the guarantee was cast in terms of protecting such rights as those persons had "by law in the province at the Union", and neither New Brunswick nor Nova Scotia had such laws at the time of union, denominational school supporters in those provinces received no constitutional protection (*Ex parte Renaud* (1873) 14 N.B.R. 273).

In 1867 there were only four provinces, but section 146 of the Constitution permitted the admission of new provinces to the Union "on such terms and conditions in each case ... as the Queen thinks fit to approve ...". As each new province was subsequently added to the country, it brought its own distinctive constitutional "terms and conditions". Manitoba, for example, was required to provide protections for the French language like those which applied to the English language in Québec (*Manitoba Act, 1870*, s.23, S.C. 1870, c.3; confirmed by *Constitution Act 1871* (U.K.)). Manitoba was also given a denominational school guarantee worded differently than section 93 in an effort (ultimately unsuccessful) to avoid the problem that had arisen in Nova Scotia and New Brunswick (*Manitoba Act*, s.22). Manitoba, Saskatchewan and Alberta were all denied the right, accorded to other provinces by section 109, to own their natural resources, and they did not achieve resource equality until 1930 (*Constitution Act*, 1930). When British Columbia entered the Union in 1871, it was with a guarantee, among others, that a rail link with the rest of the country would be completed (*B.C. Terms of Union, 1871*, (U.K.), R.S.C. 1970, App. II, #10), and Prince Edward Island joined two years later with guarantees that included transportation links with the mainland (*P.E.I. Terms of Union, 1873* (U.K.), R.S. C. 1970, App. II, #12). Among the many special constitutional provisions applicable to the entry of Saskatchewan and Alberta in 1905, and Newfoundland in 1949, were stronger constitutional protections for denominational schools than prevail elsewhere in Canada (*Saskatchewan Act, 1905* (Can.); *Alberta Act, 1905* (Can.); *Newfoundland Act, 1949* (U.K.)).

Even after they had become part of Canada, certain provinces were made the subject of distinctive constitutional treatment. Prince Edward Island, for example, although not expressly named, was the obviously intended beneficiary of a 1915 constitutional amendment that assures every province, no matter how small, at least as many members in the House of Commons (the seats of which are normally determined on a population basis) as it has Senators (section 51A). New Brunswick was placed in a unique position, so far as language guarantees are concerned, by sections 16 to 20 of the *Canadian Charter of Rights and Freedoms*. Section 52(1) of the *Constitution Act, 1982*, which enacted the *Charter*, exempted Québec, at least temporarily, from the minority language education provisions imposed on other provinces by section 23(1)(a) of the *Charter*. The guarantees contained in section 23 of the *Charter* also have considerable latent potential for "special status" in that they, like the denominational school protections in section 93, come into operation only to the extent that specified conditions prevail in particular provinces.

The Government of Canada's 1991 proposals for constitutional amendment include several items that would, or could, patently or latently, reduce our

constitutional symmetry still further. That is nothing to worry about, in my opinion. It is something that Canadians have a right to know fully about, however, so they can make up their own minds on the question. Until now, they have been told a little about the new *patent* erosions of symmetry — one of them at least — but very little has been said about the latent ones. These less obvious instances of irregularity deserve explanation as well.

The most notorious suggested reduction of constitutional symmetry is the "distinct society" clause which, under Recommendation 2 of the federal proposals (*Shaping Canadians' Future Together*, 1991, p. 51), would add a provision to the *Canadian Charter of Rights and Freedoms* (Section 25.1) calling for the *Charter* to be interpreted in a manner consistent with the "preservation and promotion of Québec as a distinct society within Canada." The term "distinct society" is defined for that purpose as including:

(a) a French-speaking majority;
(b) a unique culture; and
(c) a civil law tradition.

The distinctiveness that is sought to be preserved and promoted by this provision is a historical and sociological fact. Québec *has* a French-speaking majority, a unique culture, and a civil law tradition. That fact cannot be denied. How would anyone outside Québec suffer detriment if Québec's distinctiveness were preserved and promoted? Not at all, in my view; we would all be less rich, in fact, if the French culture disappeared from Canada. It is true that the recognition of Québec's distinctiveness by the *Charter* might be judicially employed to justify certain favoured treatment for the French culture over other cultures within Québec. But section 1 of the *Charter* already permits such favouritism, without the assistance of a "distinct society" clause. I see nothing to lose, and much to gain, from constitutionally recognizing the undeniable socio-cultural fact that Québec is different. Many other areas of Canada and many other cultural groupings, within and without Québec, are also distinct, but that should not prevent a constitutional recognition of Québec's particular distinctiveness.

A second, but less well-known, openly asymmetrical provision in the 1991 federal constitutional proposals is found in Recommendation 7, which calls for the insertion of a "Canada Clause", as section 2 of the Constitution. Such a clause would recognize, among other things, "the special responsibility borne by Québec to preserve and promote its distinct society." This would be only one of many Canadian "characteristics and values" that the "Canada Clause" would recognize. Among other characteristics listed would be "the equality of women and men", a "recognition that the aboriginal peoples were historically self-governing ..."; a "commitment to fairness, openness and full participation in Canada's citizenship by all people" without discrimination, recognition of the need to preserve "Canada's two linguistic majorities and minorities," and a potpourri of other honoured precepts including tolerance, sustainable development, free trade, and parliamentary democracy. In addition to the explicit reference to Québec's distinctiveness, there would also be a declaration that Canada's "identity encompasses the characteristics of each province, territory and community."

The impact that this "Canada Clause" would have for constitutional symmetry is difficult to assess. On the one hand, it would be broader in its reach than the main "distinct society" provision, since it would apply to all aspects of the Constitution, rather than just to the *Charter*. It could, therefore, affect the power of provincial legislatures to enact laws relating to cultural distinctiveness. On the other hand, it would have less legal potency than the proposed *Charter* provision, since it would be preambular in nature, and would, therefore, presumably be restricted to a merely interpretive role. Interpretation can loom very large in constitutional affairs, however. Moreover, the acknowledgement of Québec's distinctiveness enshrined in the "Canada Clause" could provide *political* justification for special arrangements made between Québec and the Government of Canada under certain other provisions of the 1991 proposals.

The most potentially significant of these other provisions is probably s.20, which would empower the Government of Canada to negotiate with "the provinces" separate cultural "agreements appropriate to the particular circumstances of each province to define clearly the role of each level of government." "Where appropriate," the provision continues, "such agreements would be constitutionalized." To understand the potential of this proposal, so far as constitutional symmetry is concerned, it must be borne in mind that s.43 of the *Constitution Act, 1982*, permits the Parliament of Canada and a single province to make constitutional amendments in relation to any provision that applies only to that province, and this power is expressly stated to include "any provision that relates to the use of the English or French language within a province." This would allow the federal Parliament and the Québec legislature to abolish the English language guarantees entrenched for Québec in s.133 of the *Constitution Act, 1867*. Section 20 of the federal government's 1991 proposals, if adopted, would lend political legitimacy to such a move. Section 20 would also empower Canada and Québec to "constitutionalize"

any other agreement they might choose to reach concerning "cultural matters", and, it should be remembered that the term "cultural" is capable of sweeping interpretations that would embrace everything from education to broadcasting and book-selling, from censorship to family allowances. It is likely, therefore, that if s.20 were adopted, it would contribute to reduced constitutional symmetry in Canada.

Another of the 1991 proposals with asymmetrical implications is s.24, which calls for an amendment permitting constitutional jurisdiction to be delegated between the federal and provincial orders of government. Federal-provincial delegation is not new, of course; it has been a feature of Canadian constitutional arrangements since the 1950s. Until now, however, delegation has been permissible only to *administrative* agencies of the "receiving" jurisdiction; delegation from one legislative body to another has required constitutional amendment. What is now being proposed is a scheme for inter-legislative devolution without the need for formal amendment. The Parliament of Canada would become capable, for example, of transferring to any provincial legislature or legislatures it chose to select, the power to enact laws relating to family allowances, or to marriage and divorce, within the province. As with s.20, although there is no explicit reference to Québec, it is that province which would be the most likely provincial participant in such delegation schemes. While there might be objection taken to delegation arrangements not made available to all provinces, the "distinct society" provisions of the 1991 proposals would help to disarm such objections. Delegation would be less permanent than formal amendment, of course, being in its nature a revocable process. (One hopes, at least, that irrevocable delegation is not contemplated.) Politically speaking, however, a power once delegated would be difficult to reclaim.

Constitutional symmetry could also be affected by a few other provisions of the 1991 proposals. Section 19, for instance, refers to agreements between the Government of Canada and any province on the subject of immigration. It notes that any such agreement would be "appropriate to the circumstances of that province", and states that it would be prepared "to constitutionalize those agreements." The measures proposed in s.21 for regionalizing the federal government's broadcasting responsibilities, if exercised differentially in recognition of Québec's distinctiveness, might undermine symmetry further, especially if these were made the subject of legislative delegation under s.25, or "constitutional-ization" under s.20. Differential application of the offers under s.24 and s.26 to discuss the future role of the federal authorities in certain areas of shared jurisdiction could have similar effects.

In sum, the Canadian Constitution would be even less uniform that it now is if the federal government's 1991 amendment proposals were enacted. That is no reason to oppose their adoption, however. Firefighters sometimes have to break a few windows in order to extinguish a blaze, and it would make no sense to deny them that expedient unless an uncontrolled conflagration were considered desirable. Canada would not have come into existence in 1867 if the Fathers of Confederation had insisted upon perfect constitutional symmetry, and Canada will soon cease to exist if our current political leaders insist on symmetry in the measures advanced to meet the Québec crisis.

When describing tigers, and, by implication, the universe, the poet, William Blake, used the expression "fearful symmetry". If symmetry were considered a constitutional imperative at this sensitive point in Canadian history, it would be a "fearful" concept indeed. Blake suggested that only an "immortal hand and eye" was capable of framing such symmetry. Those who bear the responsibility for framing the instrument of Canada's constitutional salvation are, not immortal. They would be well advised to leave symmetry to those who are.

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ASYMMETRICAL FEDERALISM

DISTINCT STATUS FOR QUÉBEC: A BENEFIT TO ENGLISH CANADA[1]

GORDON LAXER

How can a constitution be devised to give Québec greater powers than other provinces without reducing Québec's power in Ottawa?

Pierre Trudeau 1967[2]

The federal Constitutional proposals of September 1991 entitled *Shaping Canada's Future Together* will not resolve the tensions that are tearing Canada apart because they paper over the underlying problems. Leaving aside the aboriginal peoples' inherent right to self-government, an issue which must be urgently addressed, what we need are proposals that satisfy three long-standing constitutional goals: 1) leaving the federal government with adequate powers to maintain a unified economy and a sense of shared Canadian citizenship; 2) provide greater influence for Outer Canada in Ottawa; and 3) recognize that Québec is a sociological nation and requires extra powers than other provinces.

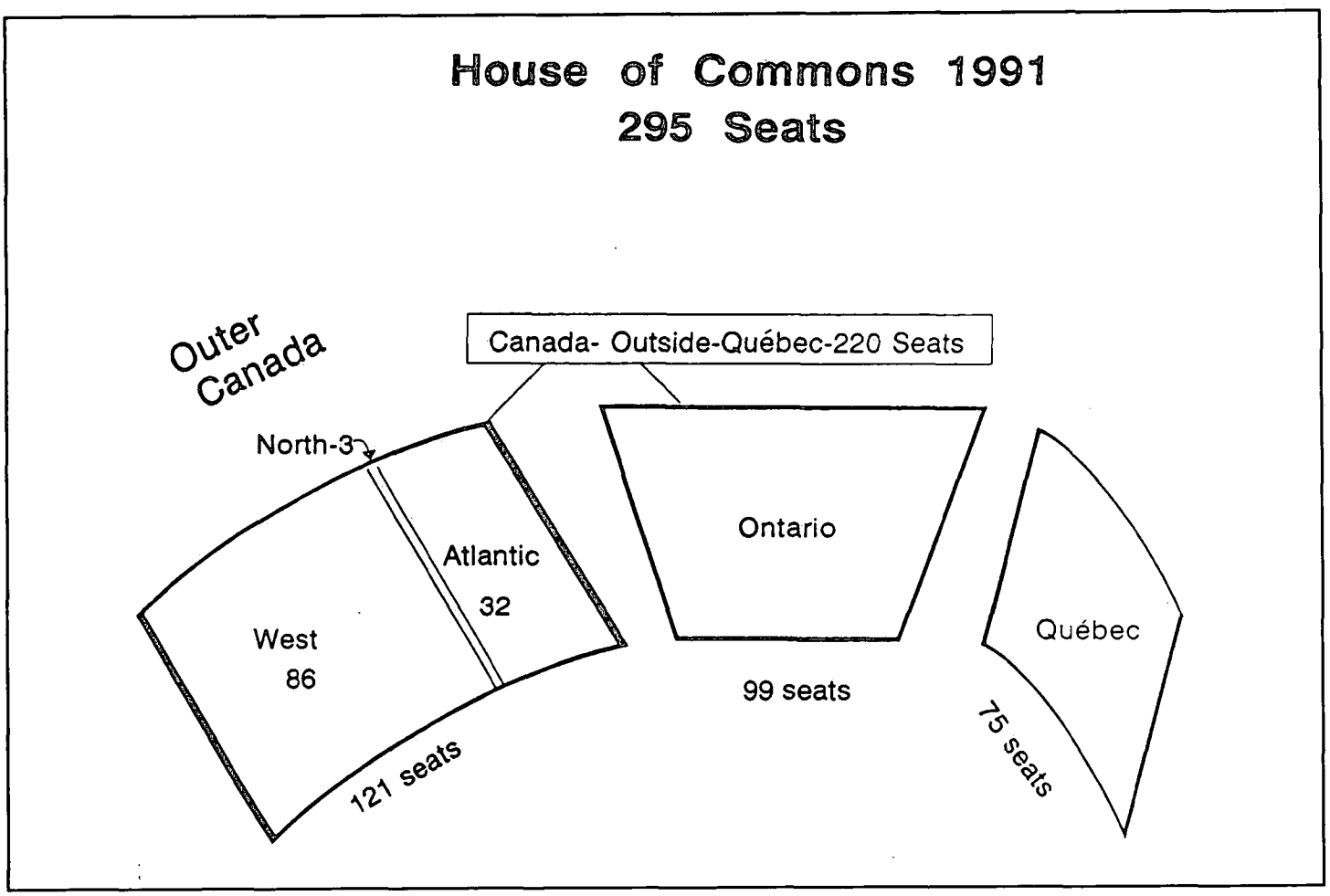
The September 1991 proposals do not satisfy any of these goals. The combination of "distinct society" and the "equality of the provinces" is at the heart of the problem. "Distinct society" is a weasel way of recognizing goal number 3 — that Québec is a sociological "nation" — but it is done in such a way as to deprive the concept of any real powers or meaning so as not to contradict the idea of equality of the provinces. But, "equality of the provinces", does not satisfactorily achieve goals one and two either.

Unlike the Meech Lake Accord, the federal proposals would, except in the discardable and probably unworkable section on the economic union, substantially weaken the power of the federal government. There is plenty of room for the provinces, individually, to negotiate extra powers. This is meant as a hidden asymmetry to satisfy Québec's aspirations but, because the equality of the provinces principle is upheld, other provinces, in the long-run, would likely seek at least some of these greater powers too. There is little likelihood that there would ever be a reverse flow of powers to Ottawa. Thus, goal number one, a sufficiently strong central government, is not satisfied. Outer Canada, comprising western, northern and Atlantic Canada, is supposed to gain more influence in Ottawa through Senate reform. But Senate reform is more chimera than reality. In neither the current proposals, nor in any conceivable proposals that are compatible with responsible cabinet government, will the Senate be given much power. In the current federal proposals a reformed Senate would get only a 6-month suspensive veto over "matters of particular national importance". In the cases of appropriation bills and votes of confidence, the power will still rest solely with the House of Commons. Appearances to the contrary then, Outer Canada will still not gain much power in Ottawa through Senate reform.

Are there better ways to meet the three goals in a coherent new constitution? Let's look at what's behind each of the goals. Québecers feel their nationality is fragile and continually under siege by the overwhelming assimilation pressures of the English language in North America. The majority in Québec appear to be looking for a way to stay in Canada but will agree to do so only if assured that they can survive and grow as a collectivity. Distinct society is not enough. Québec needs more powers as a province, to be balanced by less influence in Ottawa.

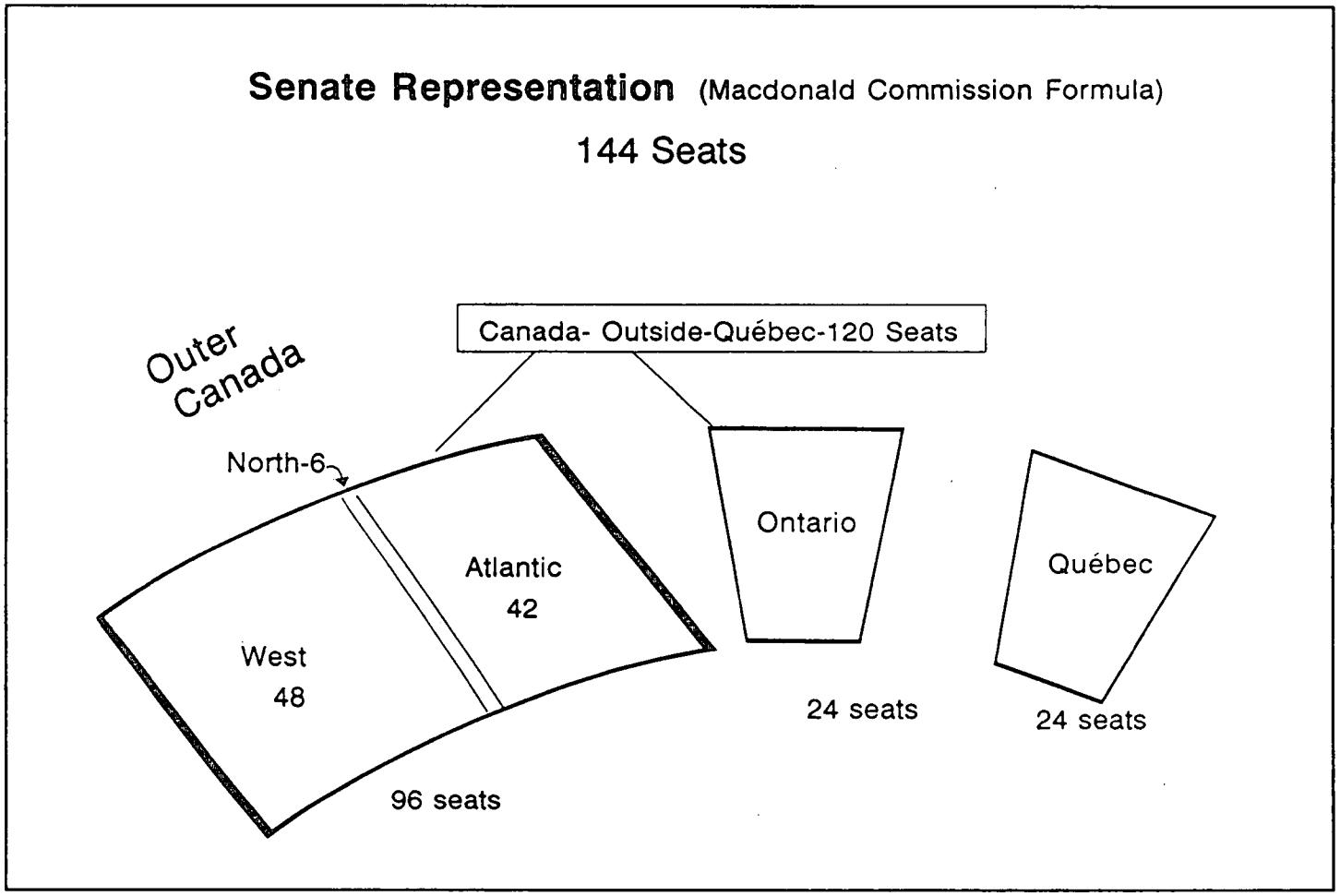
Canadians outside Québec need something very different. English-speaking Canadians' sense of Canadian nationality is also fragile, especially after the free trade agreement erased the economic border with the United States. English-speaking Canadians do not have Québec's security of a distinct language and culture in relation to the Americans and so have always relied on a strong and active federal government. In contrast to Québecers and aboriginals who relate to Canada through belonging to their collectivities within Canada, English-speaking Canadians usually identify with Canada as a whole. Because of this, rather than wanting to increase the power of their province or territory, most English-speaking Canadians want a federal government with adequate powers to maintain a sense of unity and shared Canadian citizenship. Central to meeting these needs are "national" standards in areas such as medicare, pensions and higher education, thriving "national" cultural institutions such as the CBC and a Canadian-controlled economy. The federal proposals generally weaken these bases of Canadian nationality by giving the provinces too much power.

Outer Canada is not homogeneous. British Columbia



and Alberta are "have" provinces and, in the past, their governments supported greater provincial powers, especially over resources. Being poorer and less diversified, the other 6 provinces and the territories of Outer Canada have relied on a strong federal government to counter-balance market forces with regional development policies and equalization payments. Thus, Outer Canadians have not supported a common agenda with respect to federal-provincial powers. The economic and political bases for both these orientations — greater provincial powers or reliance on federal support — have weakened in the past decade. The terms of trade generally moved against Alberta's and British Columbia's resource exports and blunted their drive for greater provincial powers. Meanwhile, the federal government's deficit combined with its neo-conservative agenda, eroded federal regional-development policies, upon which the poorer regions of Outer Canada have relied. What Outer Canadians share in common are small populations and a sense of being marginal to federal affairs in Ottawa. Preston Manning's Reform Party reflected the changed mood even in Alberta when it coined the phrase "the West wants in" and restricted itself to the federal political arena. Outer Canadians want greater influence over the federal government. A reformed Senate is not enough. Outer Canada needs more power in Ottawa's most powerful legislative body — the House of Commons.

Can we reconcile more power for Québec as a province with a strong federal government and greater influence for Outer Canada in Ottawa. Yes, but only if we discard the Trudeau-Lougheed concept of equal provinces, which has its origins in the American constitution. This concept is the main stumbling block to a lasting resolution of Canada's constitutional problems. Provinces were never equal in the sense of "same treatment". Québec has not been a province like the others and its distinctive legal and religious practices were recognized in law as early as 1774 and reaffirmed at Confederation almost a century later. The equality-of-provinces notion, that whatever power Québec gets as a province the other provinces must get too, is a straitjacket that is destructive of English-speaking Canada. It is not Québec that has insisted on this concept. If we drop the equality of provinces idea we will not have to dismantle Canada to accommodate Québec.



There are several ways to fulfill the three goals while adhering to a readily understandable principle of justice that *if Québec gains extra powers as a province, its parliamentarians must lose a commensurate amount of power in Ottawa.* Québec would be trading federal representation for provincial jurisdiction. Québecers would receive no net gain of powers — just a distinct set of them. Québecers would not have a double vote — one for themselves and another to determine questions that would apply only outside their borders. Goals one and three would be satisfied. Influence for Outer Canada in the affairs of Ottawa — goal number 2 — would also be enhanced by the removal or diminution of Québec's influence on important federal matters.

Three ways to fulfill these principles have been suggested: 1) reduce the number of Québec members of parliament for all matters; 2) make a reformed Senate into a legislature exclusively for Canada outside Québec. Instead of concurrent powers with the House of Commons, such a Senate would have separate powers. These powers would be exactly the same as the *extra* powers that Québec would obtain as a province. Or, 3) establish the rule that *for every power that Québec gains as a province, Québec's parliamentarians lose the right to vote on those matters.* There would be separate parliamentary sessions to deal with Canada-outside-Québec issues. The powers of such sessions would be exactly the same as the extra powers Québec gains as a province.

The first two proposals are cleaner and more elegant but are fraught with greater political difficulties than the third solution. The first proposal of fewer Québec MPs would reduce Québec's influence over the federal government in a manner roughly equivalent to the enlargement of Québec's powers as a province. This idea has the virtue of avoiding the creation of parliamentarians with differential voting capacities. The disadvantages though are great. Québec's remaining MPs would still be voting on matters that applied exclusively to Canada-outside-Québec and therefore should be none of their business. On the other hand, Québec would not have its fair share of MPs to vote on issues of common federal jurisdiction such as external affairs, defence or international trade. In these areas, Québecers would have less power than they deserved. In both cases representation from Québec would be seen to be unfair.

The clear functional separation of the Senate from the House of Commons, proposal number two, has its merits. A Senate without Québec senators would for the first time give English-speaking Canada an institutional voice and be the focus for the development of an English-Canadian identity. Québec's MPs would have exactly the same powers as MPs outside Québec so that the House of Commons could operate smoothly. Outer Canadian senators would outnumber Ontario senators by a wide margin and help redress the regional balance of power for matters under Senate control. The disadvantage is that such an arrangement would mean the creation of another level of government, a government for English Canada with powers parallel to Québec's extra powers. This is the proposal's major folly. In this period of high government debt and neo-conservative ideology, Canadians are in no mood to entertain yet another level of government. As well, such a reformed Senate could not perform its original purposes of regional balance and sobre second thought.

The best solution would appear to be number 3. It has a simple ring of justice to it which is understandable to all. For every extra power that Québec gets as a province, its federal parliamentarians do not vote on these issues. The proposal is compatible with a reformed Senate. Let's examine how the proposal would work, then assess the implications for influence by Outer Canada and, finally, evaluate the proposal's strengths and weaknesses.

The removal of Québec's MPs and senators from sessions dealing with issues applying only to Canada-outside-Québec would mean the creation of parliamentarians with differential capacities. But, it would not mean the creation of another level of government. In order to work there would have to be adjustments to Parliament.

(1) The House of Commons would need separate sessions: an all-Canada session and a Canada-outside-Québec session. These sessions could be held on the same day, say one in the morning and the other in the afternoon. Bills would be grouped according to whether they applied to all of Canada or not. The Senate would make similar adjustments.

(2) The Canada-outside-Québec sessions would not be a confidence chamber and the government, elected by all Canadians, would be the government in these sessions whether or not it had a majority outside Québec. The present government for instance, has a majority of all MPs but only a minority outside Québec.[3] Under these proposals, it would have to act as a minority government and make alliances with at least one other party in order to pass its bills in the Canada-outside-Québec sessions. In other words these proposals would likely increase the power of parliamentarians in relation to the Cabinet and force cooperation and alliances amongst parties in the European manner. The short-lived Joe Clark government would have been in the reverse position — a minority in the all-Canada session and a majority in the other.

What extra powers would Québec get? At a minimum: immigration, broadcasting, culture, perhaps increased jurisdiction over economic policies such as those necessary to entrench "Québec Inc.", and perhaps opting out of all federal social services. But, Québec would not simply be given all the powers it asked for in return for reduced influence in Ottawa. For one thing, the extra powers that Québec gained would determine the powers of the Canada-Outside-Québec sessions, since the two would be symmetrical. English-speaking Canada and especially its Outer Canada portion, would have its own list of powers that it wanted the Canada-Outside-Québec sessions to deal with and these are not likely to coincide exactly with those that Québec wants. Outer Canada's grievances have traditionally been economic: interest rates, control over resources, transportation and regional development policies. There would need to be negotiations between the two partners, preferably between the Québec government and Parliament excluding the Québec MPs and Senators. Furthermore, the federal government would have to retain enough powers to maintain a viable country and these go considerably beyond the Allaire Report's list of exclusive federal jurisdictions of defence, customs and currency. My minimum list of powers over which the federal government must have exclusive or primary control include: external affairs, defence, international trade, citizenship, aboriginal affairs and monetary policy. The federal government must also retain substantial but not exclusive powers over the economy and regional development.

The regional implications of these changes are amongst its most interesting features. With Québec's 75 MPs removed from votes on important matters, western, Atlantic and northern MPs would outnumber Ontario's MPs by a margin of 121 to 99. For the first time in history, the "hinterlands" would have a majority in the powerful House of Commons for important issues. In this way, depending on the powers of the Canada-Outside-Québec sessions, some of the long-standing grievances of Outer Canada for more influence in Ottawa could be achieved without any redistribution of seats and without the illusions created by schemes to reform the Senate.

But Outer Canadians' gain is not Ontarians' loss. The latters' representation would increase from one-third to 45% in the Canada-outside-Québec sessions and

Ontarians have always favoured a strong federal government, something these proposals are designed to keep. Québec too would gain what it always wanted: recognition as a sociological nation and greater powers. But, this would be fair because the more power Québec gains as a province, the more its parliamentarians lose influence in Ottawa.

The biggest objection to proposal number three arises from its greatest strength: it does not create another level of government. As one person put it: "part-time Québec MPs would still have a large say in who rules us". Proposal number three eliminates the power of Québec parliamentarians regarding issues that apply exclusively to Canada-Outside-Québec, but it does not touch, in a formal way, the wide-ranging powers of Québec cabinet ministers. The influence of Québec ministers cannot be directly curtailed in regard to outside-Québec jurisdictions unless we adopt the politically impossible proposal number 2 or some variation of it and set up a new level of government for English-speaking Canada.

Do these objections doom proposal number 3? Not if we can call upon the British tradition of unwritten political and constitutional practices changing under altered conditions. Members of Parliament from Québec undoubtedly would not be named to a number of Ministries: those whose jurisdictions applied exclusively or mainly outside Québec such as Immigration, Secretary of State, perhaps Health and others. Orders-in-Council decisions made by these ministries then would not be made by Québec cabinet ministers and the problem of double jurisdiction by Québecers would be avoided. Political justice would dictate that there be fewer Québec ministers overall to coincide with the diminished influence of Québec in Ottawa. Regarding Orders-in-Council applying exclusively to Canada-Outside-Québec but involving the whole cabinet, there would be more difficulty. Here we would have to rely on the strong expectation that Québec ministers wouldn't exercise their influence in areas deemed to be none of their business.

Are there technical difficulties such as the need for unanimity amongst the provinces? Probably not. While section 43 of the *Constitution Act, 1982*, which permits amendments applying to one or more but not all provinces, could arguably be used to increase Québec's powers, the general amending formula (at least seven provinces representing at least half of the population) would be required to make the accommodation politically acceptable. The amending formulae could be used in combination to make the changes. The seven and 50 formula is necessary to give the changes legitimacy in Canada outside Québec and section 43 is necessary to give Québec a kind of veto over changes to Québec's powers. (The Meech Lake Accord mixed two amending formulae.) If only the general amending formula were used, the other provinces could undo these changes over the objections of Québec. Alternatively if it is found that section 43 cannot be used as a de facto veto for Québec, Québec could partially protect the negotiated redistribution of powers suggested here, by the opting-out provisions under the general amending formula. The latter would protect the increased legislative powers given to Québec and the interests of the National Assembly.[4]

In the case of the exclusion of Québec parliamentarians from some sessions, Parliament can, for most matters, make its own amendments. One of the road blocks to excluding Québec MPs is the provision that Québec must not have fewer MPs than it has senators. If Québec's senators were also removed from the Canada-outside-Québec sessions, both Houses would have zero Québec members for these purposes.

Other elements could be added to this concept such as restricting the Canadian Charter of Rights to Canada-outside-Québec and constitutionalizing Québec's Charter of Rights, which preceded and is, in many areas, more comprehensive than the Canadian Charter. The important point is not to produce a fully-fleshed out blueprint but to replace the current weasel compromise that satisfies no one, with proposals that reflect the reality of Canada. Québec is a sociological nation. Why continue to deny the nationality of Québec? This will surely lead to the end of Canada. The only way to retain the integrity of Canada is to let Québec be more Québec and let English-speaking Canada be more itself too. Both sides gain when we recognize the social-cultural reality that is Canada.

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1. I wish to thank Paul Bernard, Claude Denis, David Schneiderman and Ian Urquhart for their helpful comments.

2. Pierre Elliott Trudeau, *Federalism and The French Canadians* (Toronto: MacMillan, 1968) at xxiv.

3. The Trudeau governments of 1972 and 1980 would have had fewer seats outside Québec than the Conservative Opposition and would have had to either make an alliance with the New Democrats or let the Tories take the initiative in these sessions. Either of these outcomes would have been popular in English-speaking Canada and would have better reflected the wishes of the electorate.

4. However the opting-out provisions would not guarantee fiscal compensation for Québec, if such compensation had been part of the original transfer of powers to Québec, except in the areas of education and cultural matters.

BEADS AND TRINKETS TAKE ON NEW FORM IN FEDERAL CONSTITUTIONAL PROPOSALS FOR ABORIGINAL PEOPLES IN CANADA

Larry Chartrand

INTRODUCTION

Notwithstanding the changes in form from beads and trinkets to that of written words, one thing remains perfectly clear, Canada continues to bargain in bad faith. The latest round of Constitutional proposals by the federal government demonstrates this more clearly than ever before.

Unless the federal government makes a serious attempt to revise its position on the fundamental aspects of the proposals, the outcome of this round of constitutional reform will again be a deadlock. The question will then become: to what extent will Canadians put up with living in a country which, on the international stage, remains in the dinosaur age as regards the recognition of aboriginal rights?

This commentary will focus primarily on what I perceive to be the most contentious issue in the federal proposals. Self-government is likely to prove to be the most divisive issue of all the recommendations regarding aboriginal peoples.

I. PARTICIPATION OF ABORIGINAL PEOPLES IN CONSTITUTIONAL REFORM

Before I begin to look at the substantive proposal relating to self-government, it will be helpful in understanding the federal government's position if we examine proposal three. It reads as follows:

> 3. Aboriginal participation in current constitutional deliberations:
>
> The Government of Canada is committed to ensuring that aboriginal peoples participate in the current constitutional deliberations.[1]

Besides the apparent vagueness of the proposal as to the manner of participation (consultation vs. negotiation), the proposal assumes that the federal government has a legitimate choice not to be committed to aboriginal participation. One gets the distinct impression that Ottawa is simply doing a favour for aboriginal peoples. This attitude on the part of the government ignores the fact that aboriginal consent to the *Constitution Act, 1982* was contingent "not only upon the recognition and affirmation of their rights, but also upon their participation in defining those rights."[2] In other words, commitment or no commitment, the aboriginal peoples have a right to participate in constitutional discussions: it is not an issue. First Nations regard themselves as equal partners with the federal and provincial governments. Proposal three should not even exist. One does not see a proposal stating that the Government of Canada is committed to ensuring that Newfoundlanders participate in the current constitutional deliberations. Thus proposal three is offensive and redundant. It represents an attitude that runs throughout the entire package of proposals. Ottawa views aboriginal peoples as nothing more than a special interest group. This attitude must change if there is going to be any chance of reaching an acceptable agreement.

II. ABORIGINAL SELF-GOVERNMENT PROPOSAL

Proposal four contains the proposal regarding aboriginal self-government. The provision reads as follows:

> 4. Aboriginal Self-government.
>
> The Government of Canada proposes an amendment to the Constitution to entrench a general justiciable right to aboriginal self-government within the Canadian federation and subject to the *Canadian Charter of Rights and Freedoms*, with the nature of the right to self-government described so as to facilitate interpretation of that right by the courts. In order to allow an opportunity for the Government of Canada, the governments of the provinces and the territories, and aboriginal people to come to a common understanding of the content of this right, its enforceability would be delayed for a period of up to 10 years. The Special Joint Committee should examine the broad parameters of the right to be entrenched in the Constitution and the jurisdictions that aboriginal governments would exercise.[3]

Aboriginal peoples regard self-government as an "inherent" right based on the "historical reality that aboriginal peoples have been here, living in Canada since

long before the Europeans arrived. An amendment which cannot recognize this reality is *flawed and offensive*".[4] The right to inherent self-government has not been extinguished. There is nothing in Canadian law to suggest that the right has been extinguished.

The fact that the federal government has authority under s. 91 (24) of the constitution to legislate with respect to Indians does not mean that Indians lost their right to self-government. Indeed, it would be inconsistent with the views of the Fathers of Confederation to suggest otherwise. The original purpose behind s. 91 (24) was to legislate for the benefit and protection of Indians.[5] No doubt, it would not be beneficial to the Indians for the federal government to unilaterally extinguish the Indian right to self-government.

Nor have the treaties resulted in the extinguishment of the right to self-government. Rather, they reaffirmed the "protective" relationship of the Crown and the continuing right of Indians to govern themselves. Treaty six, for example, provide that the "Chiefs would continue to 'maintain peace and good order between each other, and also between themselves and other Tribes of Indians, and between themselves and others of Her Majesty's subjects'.[6]

Thus, if the right has not been extinguished, it continues to exist. Since it continues to exist, it is a constitutionally protected right under s. 35 (1) of the *Constitution Act, 1982*. Section 35 (1) reads as follows:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Aboriginal peoples argue that the right to self-government already exists in the constitution and that the content of that right is not a mystery. The content can be determined by a careful unbiased analysis of the historical relationship between aboriginal peoples and the colonial powers. Recognition of this fundamental relationship does not prevent the parties from re-negotiating the relationship to conform with modern conceptions of the relationship that Canadian and aboriginal peoples now desire.

However, re-negotiation of an existing right is entirely contrary to the federal government proposal that the right to self-government should be entrenched into the constitution. If it already exists under Canadian and international law, why must it be entrenched?[7]

Although the federal government has recognized that aboriginal peoples were historically self-governing, the position appears to be that Ottawa does not now consider aboriginal peoples to have a right to self-government. This view is obvious throughout the federal proposals by the very language used. For example, "Aboriginal government" is recognized in the proposals both in the past tense[8] and in the future tense,[9] but nowhere does the federal government use the wording of "aboriginal government" in the present tense. When speaking of the present tense, the proposals use the wording aboriginal peoples, not aboriginal governments or First Nations. This use of language supports the view that aboriginal people are simply regarded by the federal government as a special interest group; possessing no greater powers than ordinary Canadians. The following paragraph found in the federal proposals confirms this view:

> **Like all Canadians**, aboriginal peoples look to the Constitution for a reflection of their vision of Canada and for a definition of their place within the Canadian federation...[10] (emphasis mine)

Obviously, there is a considerable gulf between the federal proposals and the aboriginal position. These differences are so fundamental that any agreement will require considerable compromise.

Considering recent events, such a compromise seems unlikely. The federal government, speaking through Joe Clark, has stated that there is some room to negotiate, however, the basics of the proposals will remain as they stand.[11] On the other hand, the Chiefs of the Assembly of First Nations rejected the federal proposals to entrench the legal right to self-government in the Constitution. Instead, the immediate recognition by Ottawa of an inherent right to self-government is required.[12] Recently, it was reported that Ottawa may consider agreeing to inherent self-government, but it must be described within the canadian federation.[13] Does this statement by Ottawa suggest progress is being made? It depends on what Ottawa means by describing the right "within the canadian federation". Does this mean that the existing division of powers scheme contained in sections 91 and 92 of the Constitution will be maintained? If so, this "progress" does not recognize aboriginal government as a legitimate third order of government in Canada. This would be unacceptable to aboriginal peoples.

Aboriginal people have a moral and legal right under Canadian and international law to require Canada to recognize an inherent right to self-government of Aboriginal peoples as equal partners in the federation.[14] The federal government's position is nothing short of a simple re-affirmation of colonial superiority, an attitude which has been time and time again discredited as pure racism.

The self-government issue may be one of the most contentious problems that will be faced by Canadian and aboriginal peoples in trying to come to an agreement. However, it is by no means the only problem with the federal proposals. The double standard between Québec's distinctiveness and Aboriginal peoples' distinctiveness is going to be a major issue. The "justiciability" of a self-government right is also of considerable concern to Aboriginal peoples as "Canadian courts have not been overly sympathetic or understanding of our traditions and culture."[15]

These, and other, contentious issues will no doubt require considerable effort and negotiation before a consensus is reached. The number of issues and the gulf between them leads one to wonder whether the federal government is serious about reaching an agreement at all. Why else would there be so many contentious issues and such great gulfs between respective positions placed in the federal proposals in the first place? Is it because the federal government is not serious about aboriginal rights?

There must come a time when the Canadian government and Canadian people come to respect the First Nations of this land. We can wait no longer for non-native society to become "aware" of Aboriginal people and their history, culture and indispensable role in building the Canadian state, a state which is esteemed throughout the world as one of the great pillars of human rights and democracy.

To continue to ignore the fundamental role of First Nations as equal partners in Confederation is to continue to bargain in bad faith as has so often been the case since the blundred attempt by Columbus to locate India in 1492.

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1. Canada, *Shaping Canada's Future Together: Proposals* (1991) at 11.
2. Ira Barkin, "Aboriginal Rights: A Shell Without the Filling" (1990) 15 Queens L.J. 307 at 321.
3. Canada, *supra*, note 1 at 11.
4. Indigenous Bar Association (Constitutional Committee), *Presentation to Joint Parliamentary Committee on a Renewed Canada* Dec. 18, 1991, at 2 [unpublished].
5. Barkin, *supra*, note 2 at 309, 312.
6. Indigenous Bar Association, *supra*, note 4 at 3 - 4.
7. For a review of recent international law changes regarding aboriginal self-determination see: Russel L. Barsh, "Aboriginal Rights And Canadian Credibility" (1991) 2 Human Rights Forum 5.
8. Canada, *supra*, note 1 at 12.
9. *Ibid* at 11. (proposal 4)
10. *Ibid* at 6.
11. Cooper Langford, "Ottawa prepared to listen says Clark" (1991) 9 Windspeaker at 2.
12. Jack Aubry, "Native Separation 'an Option'", *Edmonton Journal* (27 October 1991).
13. Peter O'Neil, "Terms of Native Self-Rule Open to Debate", *Edmonton Journal* (30 December 1991) A3.
14. Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People, Vol. 1* (Winnipeg: Queen's Printer, 1991) at 115-188.
15. Indigenous Bar Association, *supra*, note 4 at 7.

THOUGHTS ON CONSTITUTIONAL AMENDMENTS RECOGNIZING AN INHERENT ABORIGINAL RIGHT TO SELF-GOVERNMENT

Michael Asch

INTRODUCTION

This brief paper outlines what I consider the *minimum position of the Canadian state ought to be* with respect to Aboriginal political rights. It should be seen as providing a basis for negotiations between Canada and Aboriginal Nations as to the development of confederation. It is the position I believe ought to have been taken by Canada in the federal government's original proposal, but was not. In fact, it is my view that, were the federal government and other governments to accept the kind of proposal developed here freely and quickly, there would be time to develop a negotiated position amongst the parties between now and the time final constitutional proposals are tabled. So I am calling for quick action.

At the same time, I recognize that Canada, at least under the present federal government, is not likely to take the route of unilateral change toward the ideas put forward here. Thus, they will need to be advanced by others. In this context, it would be especially helpful to see support from non-Aboriginal citizens and other political parties. In fact, what is advanced here is a position that I have thought through as a non-Aboriginal Canadian and I provide it as a voice from this "side" in what must, ultimately, be a dialogue between non-Aboriginal Canadians, Aboriginal Nations, and the Canadian state.

BACKGROUND

It is clear that Canada is founded on the premise that, before the arrival of Europeans, no organized societies were in existence. This is reflected in the manner in which the Canadian constitution, both of 1867 and 1982, describe the founding of the country, in government policy and in court decisions, including recent decisions of the Supreme Court of Canada (*R. v. Sparrow*).

This proposition means that Canada is founded on a premise that devalues people it describes as fellow citizens and one that follows a line of reasoning quite common during the colonial period. It is a line of reasoning that Canada itself has attacked most strongly in the international arena, as for example, in its denunciation of apartheid in South Africa. It must be changed if we are to be a people who have built a constitution on the basis of fundamental values of political morality, such as the assumption of the inherent equality of all peoples.

In short, we must seek to change fundamentally the basis upon which Canada defines its legitimacy in the face of claims by Aboriginal Nations (these include the First Nations, the Metis Nation and the Inuit). This change, in my view, includes two fundamental components. The first is to unreservedly accept the premise that Aboriginal Nations were sovereign at the time Europeans first arrived. This is, of course, self-evidently the case and, indeed, it is supported by the approaches taken to early treaties and other documents that indicate relationships between the British, Dutch, French, and Americans and Aboriginal Nations. It is reflected in interpretations of later treaties, such as Treaties 8 and 11.

Second, it is important to accept the consequence that, given the first proposition, the only constructive way to conceptualize the joining of two independent nations into a confederation is through the free will of each. Thus, it is necessary to acknowledge that, notwithstanding the existence of Canada, Aboriginal sovereignty cannot be modified except through their own "free will", and thus would most likely be the result of a process of negotiations out of which flows an agreement in the form of a treaty between nations. As a matter of historical interpretation, it is important to understand that the language of the written treaties in those places where they state an Aboriginal Nation has "ceded" sovereignty is not generally accepted as correct by Aboriginal Nations. Rather, in general, they would suggest, as a very recent discussion paper of the Assembly of First Nations that was addressed to "Elders, First Nations Citizens, Chiefs and Canadians", said (1991:23):

> First Nations are sovereign peoples within Canada and within its provinces and territories, including Québec... . We never surrendered this sovereignty; it continues today... . First Nations have always related to the other co-founding nations of Canada on a sovereign, equal nation-to-nation basis.

This is a proposition with which I agree.

CONSTITUTIONAL AMENDMENTS

I believe that an appropriate approach to a constitutional amendment on the topic would be based on Canada replacing what is now on the table with language something similar to what is contained in the following clauses:

1. Canada recognizes and affirms that Aboriginal Nations were sovereign at the time of first European contact.
2. Canada recognizes and affirms that, notwithstanding the existence of Canada, Aboriginal Nations retain, at the minimum, an inherent right to self-government.[1]

Given that I believe these amendments (or ones like them) should have been on the table at the outset along with the other proposals brought forward by the federal government, it follows that they need to be passed immediately and should not be subject to a ten year negotiations framework, or any other process, that would delay their implementation.

DISCUSSION

Two important values of this approach are that it provides clarity upon which to build a relationship and it builds this on the basis of a thesis of equality of peoples. As such, it moves Canada clearly away from the colonial theses which up to this point have driven our constitutional ideology and, thus, provides a more appropriate way to construct our future relationship than now exists.

The proposal does not include more specifics because I do not wish to preempt what is to be negotiated. However, I advocate strongly that among the implications that flow from these proposals are guarantees of an adequate land base, just settlement of outstanding claims, and sufficient funding to enable the governments to function. Without such guarantees, the proposed amendments would be hollow and merely symbolic.

At the same time, I recognize that there will be many questions raised about implications that flow from the free acceptance of these propositions by the people of Canada and the Canadian state. Such matters will have to be addressed through negotiations and possibly by further constitutional amendment. Until they are completed, the unknowns are likely to produce many fears among non-Aboriginal Canadians, including those who have good will towards their resolution. I believe that these fears should be expressed and put on the table to discuss with Aboriginal Nations in a spirit of good will.[2]

I also believe that many Canadians, even those with good will, will avoid supporting these kinds of amendments because of a fear that the result might lead to the deligitimization of Canadian sovereignty. For example, the government has apparently propounded this viewpoint when it expressed concern that acceptance of "an inherent right" to *self-government* might lead to claims for international recognition. I believe it is important to support amendments such as these, *regardless* of this or any other consequence, as they clarify that we are prepared to proceed in the construction of our constitution in an honourable manner; one that is respectful of others and true to our early history.

At the same time, I think that these fears are likely unfounded. Aboriginal Nations, as the quote cited above attests, have repeatedly asserted that their goal is to achieve recognition of their rightful place as co-founders of Canada and not to overturn Canadian sovereignty.

In short, as I read it, evidence from history as well as from today clearly indicates that Aboriginal Nations are not seeking to destroy Canada or devalue non-Aboriginal people, but, rather, are seeking to ensure recognition of their rightful place as co-founders of this country. In this sense, the goal of Aboriginal Nations is to build confederation. It is my view that support for amendments such as the ones proposed here can help to foster this approach and thus be of benefit to all of us.

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1. At the moment, the key term in the discourse is "inherent". The proposition that devalues Aboriginal Nations and which is now promoted by governments in Canada is that their rights are "contingent" in the sense that they depend on affirmation by Canada in order to be brought into existence. I chose to use the language "*at minimum* an inherent right to *self-government*" rather than any other phrase (such as "an inherent right to sovereignty") because I believe that any such proposal is only properly advanced by Aboriginal Nations. This, of course, does not mean that such a proposition is wrong, inappropriate or out-of-bounds. As well, I accept the premise that Aboriginal Nations have an inherent right to self-determination which is founded on the principles of the United Nations charter documents on colonial peoples (United Nations Resolution of 14/12/60 which was passed without dissent).
2. One such matter is likely to be the status of privately-held lands in territories that would now fall within Aboriginal jurisdictions. Another might be fears related to the question of the relationship between individual and collective rights and, in particular, the application of a charter of rights within Aboriginal jurisdictions. These and other matters can be addressed in discussions with Aboriginal Nations.

THE SENATE

ON SENATE REFORM

Ian Urquhart

Since Canada's first intergovernmental conference in 1887, Canadians have considered modifying the Senate. Now in our second century of considering the issue of what to do about the Senate, those who want to keep a second chamber in one form or another clearly outnumber the abolitionists. The first part of this essay outlines why I believe this wastes whatever energy we have left to devote to constitutional politics. The second part of the essay assumes that, since I do not belong to the Senate reform club, my counsel will fall on deaf ears and Senate reform will remain on the constitutional table. It therefore offers a critical appraisal of the Senate reform provisions found in *Shaping Canada's Future Together: Proposals*.

The energy devoted to the Senate is misplaced for at least three reasons. First, and most importantly, there is the myth that inadequate federal representation is at the root of the West's contemporary difficulties. Western MPs have held some of the most important cabinet positions in the federal government since 1984. Portfolios of particular significance to Westerners — Energy, Agriculture, Regional Industrial Expansion — have been held by MPs from the four western provinces. Arguably the two most powerful cabinet positions in Ottawa today — Finance and Constitutional Affairs — are held by Alberta MPs.

Why do many deny that the West is well-represented in the national government? This denial probably is a response to Ottawa's failure to deliver economic prosperity to Western Canada, a circumstance attributable to events in the international economy — not to the number of Senators we send to points east. The collapse of international commodity prices, for example, has been the ruin of the Prairie agricultural and petroleum sectors thoughout the 1980s. Furthermore, the reluctance of deficit-conscious governments, federal *and* provincial alike, to increase their levels of support to victims of recession has magnified the impact of events in the global economy.

Western Canadians deceive themselves if they believe that political representation ever guarantees economic well-being. The "overrepresentation" of Québec in the national government has not solved that province's problem of chronically high unemployment. Nor did Ontario's "overrepresentation" in Ottawa protect the 139,000 manufacturing, construction, and retail/wholesale trade jobs which disappeared from that province during 1991 alone. An equal number of Senators from every province will not raise grain or petroleum prices, nor will it guarantee more successful economic adjustment policies.

My second point questions the intensity of the public's commitment to Senate reform. Do Canadians care deeply about Senate reform? Even in Alberta, the birthplace of Triple E, public support for Senate reform may be weaker than many assume. Many Senate polls are context-free — they don't invite respondents to rank the importance of the Senate as a constitutional issue or to evaluate Senate reform relative to other possible institutional reforms. When the Senate is presented in these two contexts public support appears quite soft. In 1983, as an Alberta legislative committee began the quest for a Triple E Senate, Albertans were asked which change — Senate reform, electoral reform, looser party discipline, or a change in the party in power — would make the national government more sensitive to the province's interests. Senate reform finished a distant fourth.

In the midst of today's constitutional crisis the public's insistence on Senate reform remains tepid. In December, the Angus Reid Group polled Albertans for the Select Special Committee on Constitutional Reform. When asked to identify the most pressing issue in any upcoming constitutional negotiations only five percent of the sample picked Senate reform (only two percent mentioned Triple E specifically). Far larger percentages of Albertans identified Québec Separation Issues (31%), Economic Issues (23%), and Aboriginal Issues (14%). If past rounds of constitutional discussions teach us anything, it is that lengthy constitutional agendas kill the prospects for agreement. We should not expect the intergovernmental bargaining dynamic to be any different in 1992. Items such as Senate reform (equality rights, language issues, and the social charter are others) which the Reid survey did not find to be pressing ones from the public's perspective do not, according to this lesson, belong among the constitutional proposals of the government of Alberta.

My third reason for opposing Senate reform is based in the conviction that, if a representational problem exists, it may be addressed without formal change to the constitution. For example, changing the operations of the House of Commons is an alternative way to address representational grievances. I agree completely with the federal government's observation in its current proposals that modifying the convention for non-confidence votes

would represent a very significant reform. More free votes in the House of Commons might increase MPs' propensity to serve as a conduit for constituents' opinions (assuming these opinions are detectable).

Federal electoral reform is another non-constitutional alternative meriting attention. The introduction of a limited version of proportional representation to our "first-past-the-post" electoral system could increase the extent to which provinces, as well as underrepresented groups such as women, are represented in the national legislature.[1] In the past, more Albertans placed their faith in these two reform suggestions than they did in Senate reform.[2] It is unfortunate that the disturbing tendency to view the constitution as *the* vehicle for political change may be blinding Canadians to the plausibility of non-constitutional alternatives.

THE FEDERAL PROPOSALS

What type of second chamber is envisaged by the federal proposals? It would be a directly elected body — possibly through a system of proportional representation — and its elections would coincide with House of Commons campaigns. Its current powers would be reduced significantly. In terms of representation, the proposals would ensure more equitable, not equal, provincial representation and guarantee aboriginal representation. Also, whatever method of election is selected, it should promote the representation of women and ethnic groups.

The Special Joint Committee is invited to consider the Macdonald Commission's recommendations on using a system of proportional representation to elect Senators.[3] If adopted, proportional representation would probably alter the legislative composition of political parties and encourage a re-thinking of Canadian regionalism. Short of constitutionalizing representational quotas for groups, proportional representation will encourage parties to include "political minorities" (women, aboriginals, ethnic groups) among their Senatorial candidates. One of the very interesting components of the Macdonald Commission's version of proportional representation is the suggestion that Senate constituencies in southern Canada should be based, except in Prince Edward Island, upon regions within provinces. In practice, this seems likely to challenge the notion of homogeneous provincial interests. This type of institutional change may facilitate the expression of the intraprovincial variations in political attitudes discovered in individual provinces.[4] It also opens up the possibility of cross-provincial alliances forming between those who represent similar regions in different provinces.

Proportional representation may also temper the homogenizing impact of the coincidental Senate and House of Commons elections proposed in *Shaping Canada's Future Together*. Without proportional representation, coincident elections promote the possibility that the Senate's composition will simply mirror that of the House of Commons. The goal of increasing the accountability of the House of Commons to provincial/minority interests also may be promoted through abandoning the coincident election proposal in favour of fixed terms (i.e. 3 or 5 years or perhaps two years after the last House of Commons election). If the Senate retained significant powers to modify or block Commons legislation, Senate campaigns waged under this alternative format would pressure the governing party in the House of Commons to ensure a measure of provincial/minority sensitivity throughout its mandate.

When it comes to evaluating the representational aspects of the Senate proposals, I was struck by their resemblance to an archaeological excavation. In regard to the logic of representing interests in the second chamber, the federal proposals, like an archaeological dig, document the historical record of the hopes and demands left behind by successive generations of would-be constitutional reformers. The oldest concern, increasing the voice of provinces and territories in the national government, is the primary representational logic in Ottawa's proposals. To the chagrin of those who favour Triple E, the representation of provinces and territories would become more equitable, not equal. But, Ottawa proposes to temper this representational basis for a reformed second chamber with a host of other representational concerns, some of very recent vintage. One very significant concern — representing political minorities — has already been noted. In addition, Canada's linguistic duality and the method of election in the House of Commons should also be taken into consideration when formulating the Senate's representational mandate.

An important uncertainty accompanies the offer of this collection as a single proposal. This uncertainty results from the failure to ask how the formal recognition of a variety of representational logics in a single political institution will affect its operations. One of the distinguishing features of the *Constitution Act, 1982* is its incorporation of competing views of the constitution — a contributing characteristic to the Meech Lake conflict.[5] If the second chamber is asked to respect a potpourri of representational logics we may repeat that mistake. More thought should be given to the issue of the relationship Canadians want to establish between this political institution and their society.

The powers given to the Senate are crucial not only for its ability to voice effectively its various representational logics but also for its relationship with the House of Commons. Without sufficient legislative

powers, the groups/territories that may have their representation enhanced in the Senate will enjoy only symbolic, not effective, representation. On the other hand, the retention of significant legislative powers in a reformed Senate promises to frustrate the governing party in the Commons and lead to deadlock between the two legislative chambers. Participants in the Senate reform debate must recognize that the types of powers assigned to a reconstituted Senate will be crucial to the effectiveness of not only provincial/minority representation but also to the operation of the House of Commons.

Generally speaking, if the federal proposals were implemented, the Senate's formal powers would be reduced. The federal proposals limit the Senate's powers and reaffirm the Commons as the primary legislative body in Canada. This position is animated, on the one hand, by the difficulties which the incumbent government has had in securing Senate passage of legislation (ie. drug patent legislation, borrowing bills, the free trade agreement, the GST). As well, though, this position reflects a concern that Canada must avoid the Australian experience where a powerful Senate occasionally has frustrated the ability of the governing party in the House of Commons to pursue its legislative agenda.

Three proposals promise to reduce the Senate's formal power. First, the second chamber would not be allowed to play any role in regards to appropriation bills and borrowing authority legislation. The Alberta Premier's wish that the Senate would have the authority to stop National Energy Programme II, therefore, is unfulfilled by Ottawa's proposals. Second, only the House of Commons would be a confidence chamber — a defeat in the Senate would not force a general election. Third, in matters of "particular national importance" — defined for the time being only as national defence and international issues — the Senate would only have a six-month suspensive veto. The strong similarities between the current federal proposals and those made by the Special Joint Committee on Senate Reform (1984) suggest that a more specific list of matters of particular national importance is likely to be lengthy.

The Senate would only definitely retain an absolute veto over matters pertaining to language and culture where a double majority voting rule would be in effect. This category of parliamentary business would require support from a majority of Senators as well as from a majority of francophone members. As Smiley and Watts noted in 1985, however, this provision's limited value would be primarily symbolic.[6] The only new power that the federal proposals offer to a reformed Senate would be to ratify appointments to many (but not all) national institutions. While the head of the National Library would be subject to Senate ratification (by an unspecified ratification rule) a new appointment to the Supreme Court would not be! Clearly, the section on Senate powers should concern those who hope that a new Senate will represent more effectively a particular constituency.

Before concluding, it should be noted that the ability of a new generation of Senators to speak out for provincial/minority interests depends in large measure upon the extent to which party discipline is relaxed. While the federal proposals mention relaxing party discipline in the House of Commons they are silent on how this principle should operate in the Senate. Advocates of change correctly assume that party discipline will inhibit the Senate's ability to serve as a forum for the expression of regional preferences. This certainly has happened in Australia. Party discipline has transformed Australia's Triple E Senate into an institution where party, not regional, interests dominate. While reformers may be correct in predicting that innovative measures will weaken the influence of party,[7] I doubt very much that partisan politics will be kept out of an elected Senate. The internalized norms of party ideology, as well as formal sanctions, are important foundations of party discipline and will remain beyond the reach of institutional tinkering. Moreover, some versions of proportional representation may actually strengthen the ties between party and candidate.

By now Canadians are exhausted by the daily barrage of constitutional news and views. It will probably not be popular then to recommend further debate on the issue of what to do about the Senate. It may nonetheless be sound advice since up until now the question "what does effective mean?" has been addressed too infrequently in the debate surrounding Senate reform. Much careful thought must still be given to the implications for governing which will accompany any effort to satisfy an evergrowing list of representational demands. Are these demands competing? What powers must a Senate have in order to represent a multitude of constituencies effectively? Finally, if effective means a Senate with strong formal powers then are we prepared to live with the possibilities of deadlock between two popularly elected bodies? Perhaps the best advice to Canadians is: debate Senate reform for another hundred years before deciding what to do about the second chamber.

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ECONOMIC UNION

LIVING TREE OR WIRED BONSAI? THE FEDERAL GOVERNMENT'S CONSTITUTIONAL PROPOSALS ON THE ECONOMIC UNION

Linda Trimble and Connie Morley

INTRODUCTION

The purpose of a constitution is to help sustain the spirit and the life of a nation. For all of its flaws, Canada's constitution has exhibited remarkable adaptability. Governments have been able to respond to changing fiscal and social circumstances, as evidenced by the development of fiscal federalism and the use of the spending power for shared-cost programs such as health care and social assistance. Judicial decisions have enhanced the responsiveness of the federal system by applying the "living tree approach". The living tree metaphor, which was first suggested in the 1930 Judicial Committee of the Privy Council decision in the Person's Case, compares the constitution to a "living tree capable of growth and expansion within its natural limits" (*Re Section 24 of the B.N.A. Act*, pp.106-107) we believe that the flexibility and adaptability of the constitutional framework has helped promote liberal democracy in Canada. Yet current constitution-makers do not seem to be sufficiently aware of the need for simplicity in the constitutional document, as evidenced by their apparent desire to "constitu-tionalize" everything but the kitchen sink.

Our paper analyzes the federal government's constitutional proposals regarding the economic union. We argue that these proposals pose a fundamental challenge to the principles of federalism and liberal democracy in Canada. Certain of the provisions will prevent democratically elected political representatives from changing the policies of past governments or enacting new legislation. Other proposals, if enacted, will constrain and confuse judicial decision-making by limiting the courts to a narrow, history-bound approach to constitutional interpretation and by presenting contradictory constitutional goals.

While we believe the proposals will undermine the rights of all citizens to democratic representation, we feel the proposals are particularly harmful to women and other socially, economically and polititically disadvantaged groups. The economic provisions are insensitive to gender and class differences — differences in access to economic resources and rental property, in mobility, and in need for social services and labour force regulations. If enacted, the economic union provisions will further entrench the economic inequality of women, aboriginal Canadians, the disabled, visible minorities and others who face systemic discrimination.

THE COMMON MARKET CLAUSE AND THE ECONOMIC UNION

The federal proposals recommend additions to sections 121 and 91 of the BNA Act. Revisions to section 121 are designed to induce a common market by ensuring economic mobility within Canada. The new clause will prohibit government action which limits the free movement of goods, people, capital and services.

The clause is directed in particular at provincial trade barriers such as preferential treatment for local suppliers of goods and services (*Partnership for Prosperity*, p. 17). However, the federal government proposes to permit two categories of exceptions, one for the federal government and one for the provinces. (There is also a "national unity" exception, to be discussed below, but use of this exception requires the support of the federal government and 2/3 of the provinces with at least 50% of the population.) Firstly, the federal government is allowed to enact laws which further the principles of equalization or regional development. Secondly, provincial governments can make laws to eliminate economic disparities within the province as long as the laws prove no more onerous to the people outside the province than those within it. Given the federal government's poor record with respect to encouraging regional development, the fact that regional development and equalization policies will be exclusively a federal matter is cause for concern (see Savoie).

It seems odd that while interprovincial trade barriers are forbidden by the clause, intraprovincial barriers are sanctioned despite the federal government's belief that this exception will still permit various problematic trade barriers. This is where the proposal for a revised section 91 steps in. As the federal government document explaining the economic union proposals states:

> A revised section 121, while potentially wide-ranging, may not address the full range of barriers. Certain impediments, such as those that arise as a result of differing regulatory practices, may not be characterized by the courts as being

> barriers or restrictions within the meaning of a revised section 121.... In addition, governments may wish to avoid the uncertainty, costs and time associated with addressing certain kinds of barriers through the courts by having recourse to an alternative forum for the resolution of these problems. (*Partnership for Prosperity*, pp. 23-24)

For these reasons, the federal government suggests section 91A, which will give the federal government the power to ensure "the efficient functioning of the economic union". This clause is intended to add "punch" to the common market clause (121) by giving the federal government a political as well as a judicial means of addressing trade barriers. It allows the federal government to respond immediately to provincial barriers which "do not result from explicit discrimination" (*Partnership for Prosperity*, p.24) If a province enacts a regulation or law which the federal government and two thirds of the provinces representing a least 50% of the population deem a hindrance to interprovincial trade, then the federal government may use Section 91A to disallow the legislation *even if it is viewed by the courts as furthering the principles of equalization or regional development*. In other words, barriers to mobility which may be allowed under section 121 could be overruled by section 91A. In this way, the goal of "efficiency" overrides the principles of equalization and regional development.

There are three serious problems with these proposals. First, it will be quite difficult for governments to deal with economic inequalities which do not result from regional differences. The second problem is that the proposals challenge fundamental principles of federalism and liberal democracy. Thirdly, the goal of "efficiency", which underlies these proposals, will constrain governments' ability to act and will confuse judicial decision-making. These three areas of concern are elaborated upon below.

1. NON-REGIONAL INEQUALITIES

The federal government proposals appear to assume that the only legitimate purpose of government regulation of the free market is to correct regional imbalances. Women, visible minorities, the disabled, aboriginal Canadians, and others who face poverty should be concerned about the proposed economic union provisions. There appears to be little room for governments to address economic circumstances affecting disadvantaged individuals and groups. Would the economic union clauses allow governments to enact policies such as employment and pay equity regulations, training programs designed to integrate women into non-traditional fields, and tax credits for companies which offer corporate day care? Perhaps, under the third area of exception under section 121; laws declared by the Parliament of Canada to be "in the national interest". However, exempting such laws under this category requires the support of the federal government as well as two thirds of the provinces representing at least 50% of the population of Canada.

For example, say the government of Alberta wishes to offer tax incentives and start-up costs to companies providing on-site child care. Some companies may be offended by the law; small businesses and corporations employing few women may feel disadvantaged. The law will be vulnerable under section 121 because its goal is not to develop the region or promote equalization; rather, the policy is intended to help achieve economic equality for women. Alberta's new policy could be declared "in the national interest" but only with the support of the federal government and six other provinces representing at least 50% of the population. Why should the government of Alberta need the approval of other governments to further the legitimate social and economic goals of its citizens?

The federal government has admitted that other exceptions to a revised section 121 may be "appropriate", and has asked the Special Joint Committee to consider this. At the very least, the following exception should be added:

> 3) Subsection (2) does not render invalid:....
>
> d) a law or program or activity of the Parliament of Canada or the legislature of a province or territory that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The revised section 121, with the additional exception listed above, would be consistent with the Charter of Rights and Freedoms. But, would governments actually be able to make policies which ameliorate the conditions of the disadvantaged? Yes — if other governments do not mind. This brings us to the second problem.

2. FEDERALISM AND DEMOCRACY

Let us assume the "best case" scenario — that subsection 3(d) is added to the revised section 121 — and develop an example which is based in fact. The government of Ontario presently has a pay equity policy which regulates the private sector. This is allowed under our improved section 121 because it seeks to address the economic discrimination faced by women in the paid labour force. However, businesses in Ontario do not like the policy. They say it imposes unfair costs and constrains their ability to operate efficiently in the

marketplace as their ability to compete with companies based in other provinces (which are not required to abide by such regulations) is thus hindered. Ontario businesses could appeal to the federal government, which may agree with them. Provincial governments, which do not wish to enact pay equity policies in their own provinces, may also wish to support the private sector in Ontario. The federal government, with the support of 7 provinces comprising 50% of the population, could use the revised section 91 to make a law prohibiting private sector pay equity policies, arguing that such policies impair efficiency. The government of Ontario could declare that the Act of Parliament does not apply in Ontario, but this would require a resolution passed by 60% of the members of the legislative assembly; as well, the government of Ontario could only "opt out" for 3 years. As it currently stands, the NDP government of Ontario does not have 60% of the seats in that province.

In a federal state, power is divided between two levels of government, each of which has legislative jurisdiction in its own sphere. The Canadian federation features considerable jurisdictional overlap as well as areas of joint jurisdiction; in other words the division of powers is not pure, nor is it simple. Recent court decisions in the area of environmental legislation attest to this fact. The revised section 91A extends this practice by allowing Parliament to "pass legislation for the efficient functioning of the economic union *in areas beyond its existing jurisdiction*" (*Partnership for Prosperity*, p. 24, emphasis added). This is not a new element of Canadian federalism; the spending power allows the federal government to act outside its jurisdiction via cost-shared programs. What is new is the involvement of the provinces. The "national interest" exemption under section 121 and the "efficient functioning" provision of 91A each require the ratification of 2/3 of the provinces with a least 50% of the population, thereby introducing a new and undemocratic dynamic to federal-provincial relations. To put it very simply, provinces will be able to gang up on each other (and on the federal government). The power to promote the efficient functioning of the economic union will allow governments to act outside their areas of constitutional jurisdiction and override the decisions of other democratically elected governments.

More problematic for federalism and democracy in Canada is the fact that corporations will be able to go to the courts to challenge the regulatory actions of government. This is not new: Mallory observed in *Social Credit and the Federal Power* "how vested economic interests challenged both provincial and Dominion legislation as being *ultra vires*, if that legislation meant a regulatory encroachment on the economic system." (Mallory, in Porter, p. 381). As Mallory stated:

> In a federal country, those resisting [regulation] were able to cloak their economic motives in a concern for the public interest by raising doubts as to the power of the legislature to enact laws to which they objected....Even in cases where a statute had been referred to the courts for an opinion on its validity there is reason to believe that objection often existed more to its purpose than to its source. (Mallory, p. 32)

Under the proposed revisions to sections 121 and 91, the business sector will appeal to the courts by claiming that the natural order, determined by free market forces, must not be hindered by government policy and regulation. They will be supported by the "efficient functioning" clause embedded in 91A. In short, the proposed revisions to sections 121 and 91 will have businesses running to the courts claiming all manner of legislation to be "ultra vires", thereby confusing jurisdictional issues, overloading the courts, and preventing governments from acting on legitimate matters of concern.

3. EFFICIENCY

It is not clear that "efficiency" serves as an appropriate standard for legal interpretation of issues of national interest. And, the term may restrict the courts to a very narrow frame of reference, and may present the courts with constitutional contradictions.

What does the term "efficiency" mean? There is popular agreement among economists that efficiency is determined by the ratio of output to input. Where efficiency is a goal, the objective is to minimize inputs and maximize outputs in order to have a competitive nation. In reference to competitive capitalism, Friedman explains the importance of voluntary cooperation and the social benefits of a free exchange of goods and services. Further, for Friedman, the household is a relevant unit of analysis in this regard:

> In its simplest form, such a society consists of a number of independent households — a collection of Robinson Crusoes, as it were. Each household uses the resources it controls to produce goods and services that it exchanges for goods and services produced by other households, on terms mutually acceptable to the two parties to the bargain. It is thereby enabled to satisfy its wants indirectly by producing goods and services for others, rather than directly by producing goods for its own immediate use. The incentive for adopting this indirect route is, of course, the increased product made possible by division of labor and specialization of function. Since the household always has the alternative of

> producing directly for itself, it need not enter into any exchange unless it benefits from it. Hence, no exchange will take place unless both parties do benefit from it. Cooperation is thereby achieved without coercion. (Friedman, p. 13)

The problem is that Friedman assumes there is no poverty, because all households produce goods and services to satisfy "wants". What about the single-parent household which is dependent on the state and cannot meet its needs within the natural order of the marketplace?

Moreover, Friedman does not consider the fact that, within a household unit which is able to meet its *overall* needs, specific individuals may not have their needs satisfied. Friedman overlooks individuals within the household and assumes lack of coercion within the household. Indeed, it is possible for children, women, the sick and the elderly to be coerced through deprivation and violence. A similar analysis could be applied to the Canadian nation; the GNP may rise even though certain provinces or regions are experiencing economic hard times. Economic growth in the centre may be achieved at the expense of the peripheries (especially the Atlantic provinces). The unintended consequences of the goal of efficiency may, therefore, include an unjust distribution of wealth which will not show up in a monetary measurement of the ratio of input to output.

Many observers may ask, "efficiency for whom?" Academic ambiguities inherent in the definition of efficiency are further evidenced in discussion of how to achieve an objective measure. For instance it is uncertain whether a decrease in efficiency is determined by changes in the physical employment of capital (the way labour is working), or by change in the value of capital assets (see Keynes, p. 138). The ambiguity will be up to the courts to resolve, and the courts will be constrained because they cannot take unintended consequences into consideration. For instance, in the case of the GST (an initiative intended to increase efficiency in the economic union), an assessment of the full economic impact of the legislation could not be made. As the Alberta Court of Appeal stated: "Effect is relevant for colourability only to the extent that it is evidence of purpose" (*Reference Re: Goods and Services Tax (Alta)*, p.604). In other words, consequences other than those expressly stated by the legislation and predicted by the social theory underlying the legislation cannot be entered into evidence before the courts. The argument that the GST would disadvantage certain segments of society was viewed by the Court to be irrelevant to the judicial decision-making process in this case. The term efficiency and the effects of policies based on premises of "natural order" (e.g. market forces), including effects which are unintended, are of *academic* rather than of constitutional and legal character.

The goal of efficiency (however defined) will conflict with other constitutionally entrenched goals and principles, such as the rights and freedoms articulated in the Charter and the commitment to regional development and equalization discussed earlier. The Courts will need to balance the supposed benefits of government initiatives designed to increase *national* efficiency with the needs of "have not" provinces and with the rights of individuals. What will take primacy; the goal of efficiency for the nation as a whole or the principle of regional development? Efficiency at the level of the household or individual rights and freedoms? What will happen to aboriginal governments: they may have very different views of efficiency and section 121 will undoubtedly undermine their attempts to build local economies.

The Canadian economic union is a political creation. Confederation brought together disparate colonies which had few trading links. McDonald's National Policy fostered east-west trade, transportation and communications. Attempts have been made by politicians to remedy regional economic disparities and to provide a social safety net for those disadvantaged by the free market system. While the pursuit of economic efficiency is laudable, it must be remembered that in Canada, this quest has always been tempered by equally admirable social and political goals.

HARMONIZATION OF ECONOMIC POLICIES

The proposal suggests that the governments of Canada develop guidelines for the harmonization of fiscal policies and write these into federal legislation under section 91A. These guidelines would require the approval of at least seven of the provinces representing 50% of the population and up to three provinces could opt out. This may be a laudable goal, but it must not be pursued at the expense of democratic politics. The government of Alberta, for instance, may agree to the harmonization guidelines and choose to "opt in". A newly elected government in that province may disagree with the guidelines but will be *required* to abide by the agreement made by their predecessors. Specific policy processes should not be binding on future governments.

NEW OR NEWLY RECOGNIZED AREAS OF PROVINCIAL JURISDICTION

Policies in the areas of job training, immigrant services, recreation and housing are expensive and some provinces will not be able to afford new responsibilities (training, immigration) or will not find it easy to adjust to the withdrawal of federal funding in areas of provincial responsibility (recreation, housing). Many programs may be abandoned unless governments have sufficient

flexibility in cost-sharing arrangements to maintain commitment to these areas. Some examples which come to mind include: job training programs designed to integrate women into traditionally male occupation, ESL programs for immigrant women, low-income housing, second-stage housing for battered women, and summer recreation programs for children. Further, some of these programs, if funded and implemented at the provincial level, may be seen as barriers to economic mobility under section 121.

LEGISLATIVE DELEGATION

This is a powerful clause allowing federal or provincial governments, by mutual consent, to delegate legislative authority from one level of government to the other. It could add a necessary element of flexibility to the federal system, and is a potentially useful provision. For example, it could be used to respond to the demands of Québec. Problems could arise however. For instance, a deadlock could be reached if a provincial government agrees to delegate responsibility over an area such as post-secondary education; if a new government is elected in the province and it wants the legislative authority back, what happens if the federal government refuses? Moreover, problems could emerge if a provincial government has lost fiscal power and the federal government refuses to take any responsibility.

CANDIDATES FOR STREAMLINING

Governments should take gender into account when rationalizing government services. The policy demands of the women's movement do not fit neatly into jurisdictional boxes, and often require legislation and funding by three levels of government (federal, provincial, municipal) plus financial support from the business sector. However, it should be noted that this process does not require constitutional amendment.

THE FEDERAL SPENDING POWER

The federal spending power has provided flexibility in Canada's federal system. However, under this provision, new shared-cost programs or conditional grants will require approval of two-thirds of the provinces with 50% of the population. In other words, introducing a new social program will require a *de facto* constitutional amendment. Certain policies — homemaker's pension, a national child care strategy, a guaranteed annual income program — are highly unlikely to "pass" such a restrictive test. Current federal policy allows provinces to "opt out" of shared-cost programs, with full financial compensation (a provision important to the province of Québec). Why change the status quo, which allows considerable flexibility on the part of both levels of government?

THE COUNCIL OF THE FEDERATION

The proposed Council of the Federation will entrench the practice of executive federalism and place it within an unelected, unaccountable extra-parliamentary body. Such a proposal contradicts the federal government's stated commitment to institutional reforms designed to enhance the representative nature of democratic institutions.

PROPERTY RIGHTS

While this provision is not part of the economic union proposals, property rights will challenge the economic security of many individuals, especially women. Most women do not own property and many are renters of property. The property rights provision could override provincial human rights legislation which prohibits discrimination by owners of rental accommodation. A property rights clause in the Charter could be used to challenge divorce legislation which requires equitable distribution of marital property. It could also be used to challenge maintenance enforcement policies (attempts by governments to collect maintenance payments). This "right" would make it extremely difficult for governments to address the feminization of poverty.

CONCLUSION

Inclusion of the goal of "efficiency" in the management of the economic union clearly serves as a limit upon judicial interpretation. Given the specific political nature of the common market clause, traditional liberal interpretation is restrained. Court decisions about the nature of disputes would be assessed on the basis of a rigid constitutional framework which embodies specific expectations of human behaviour under supposed "free market" conditions. As well, the restrictions on government decision-making posed by these constitutional provisions limit the rights of citizens to democratic expression and representation.

The federal constitutional proposals designed to ensure an efficient economic union will have the effect of pruning the constitutional living tree. Hence, the "living tree" becomes the "wired bonsai".

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CONSTITUTIONAL OPTIONS

THE AGENDA FOR CONSTITUTIONAL REFORM

J. Peter Meekison

It is obvious from reading *Shaping Canada's Future Together*[1] that the government has learned a number of lessons from the Meech Lake experience. The public is encouraged, indeed urged to become involved in the debate: "Every Canadian will have the right — and the responsibility — to participate."[2] Individuals can phone a toll-free number to make their views known, a technique first used by the Spicer Commission.

What does the federal proposal contain? It has 28 separate recommendations, and, among other things, touches on institutional concerns, aboriginal issues, the economic union, the division of powers, and the distinct society of Québec. In some instances draft constitutional language has been provided; in others only an idea has been presented. The process appears to be completely open-ended with respect to its content and is limited only by time constraints. There is certainly no "take-it-or-else" approach this time around. Questions I have heard asked are whether there is now too much on the table and whether the public will be able to digest the entire package. It should also be noted that none of the recommendations requires unanimity, another lesson learned.

Some see the document as centralizing, others as decentralizing. The reality is that both tendencies can be found. There are elements of the Meech Lake agreement in the proposal, recognition of the 1991 Allaire report of the Québec Liberal Party, recognition of western demands for Senate reform, and recognition of a federal concern for strengthening the economic union. The document is a hybrid mixture of constitutional proposals and ideas. There is little that is new in the federal proposal although there has been some repackaging. Thus to a certain extent many of the issues have been discussed before, while a few have not.

Time does not permit a detailed analysis of the proposal. I would like to comment briefly on the recommendations on the distinct society clause, Senate reform, the Council of the Federation, the economic union, and the proposed new federal legislative authority on the economy.

A. DISTINCT SOCIETY

One recommendation which has drawn considerable attention thus far is that on the distinct society clause. This is not surprising because that part of the Meech Lake agreement was probably the most scrutinized and criticized provision of all. Instead of being a free-standing clause in the constitution it is now to be incorporated into the *Charter of Rights* as one of several interpretation clauses. Distinct society reflects the reality of the Canadian polity and the 1867 Confederation agreement. As part of the *Charter*, it is subject to all *Charter* interpretations and limitations such as the other interpretation clauses. The clause is not given primacy of place within the *Charter* and does not give Québec special status. While often debated, there also appears to be a growing recognition that this clause, or something equivalent to it, is necessary if an overall agreement with Québec is to be reached. Recent supportive comments by both Premier Clyde Wells and the National Action Committee on the Status of Women suggest that this time the phrase has a better chance of being accepted. In my view, this clause, given its now symbolic importance in Québec, is a deal-maker or breaker.

B. SENATE REFORM

The federal government's position on Senate reform suggests it is in favour of change but it has not fully embraced the Triple-E concept (equal, elected and effective). The parliamentary committee has considerable latitude in developing the final position. One of the key references in the document is the following statement: "... the reality of contemporary Canadian politics is that *provinces and territories, and not regions*, are basic to our sense of community and identity."[3] While the proposal clearly supports equitable representation, it does not completely rule out the idea of equal representation.

There can be little doubt that Senate reform appears far more probable today than it did a few years ago. The federal proposal suggests that Senate elections should coincide with elections to the House of Commons. I disagree because Senate election results would mirror those in the House of Commons. The justification for a second chamber in a federation is that provincial interests should be reflected there. Elections to the Senate could coincide with provincial elections as was proposed by the Alberta Select Committee on Senate Reform. Another alternative is fixed term elections with part of the membership being elected at set intervals, e.g. a six-year

term with half the members selected every three years. Whatever model is chosen, I feel that every effort should be made to avoid a situation where the two houses are elected simultaneously.

How effective is the Senate to be? Is it to be a legislative chamber with authority comparable to the House of Commons? At first glance it would appear to have major responsibilities. Closer inspection suggests there may be some significant limitations to this authority.

The federal proposal identifies three degrees of legislative activity for the Senate:

1. areas where the Senate must give its approval, i.e. an absolute veto (which it has now),
2. areas of "national importance" such as national defence and international relations where there would be a six-month suspensive veto, and
3. money bills where the Senate would have no say at all.

There are a number of problems here which require further analysis. As long as we adhere to a parliamentary system of government, it stands to reason there can only be one confidence chamber, the House of Commons. But, that should not preclude debate in the Senate on money bills. A suspensive veto of 30 days, a delay comparable to that of the House of Lords in the United Kingdom, is not an unreasonable limitation. What is more problematic is defining a money bill. For example, the 1980 National Energy Program was introduced as part of the federal budget. Was it therefore a money bill and as a result a matter of confidence? Moreover, even when a definition is agreed to, some kind of mechanism for dispute resolution will be required. To me, resort should be to a parliamentary committee of some kind, and not the courts.

An equally difficult challenge will be to define and secure agreement on what constitutes a matter of "national importance" and, therefore, is not subject to a Senate veto, but only a six-month delay. One assumes from the very beginning that most federal legislation is of national importance. Examples would be the *Criminal Code*, *Supreme Court Act*, *Elections Act*, *Official Languages Act*, *National Transportation Act*, *Canada Health Act*, and *Fiscal Arrangements Act* to mention but a few. The limitation on international issues would likely prevent the Senate from reviewing matters such as the *Free Trade Act* which was essential to implementing the Free Trade Agreement. While these questions need clarification, they are certainly capable of resolution. The net result will be a more effective second chamber.

What must be recognized is that any new chamber will have an enormous impact on the legislative process and hence public policy. It will take several years before working relationships between the two houses become fully established. Giving greater weight to western and Atlantic regions will create a much stronger regional influence in decision-making at the centre.

If equal representation becomes a reality, influence from outer Canada will be that much greater. The most contentious issue of Senate reform is the question of provincial equality. The federal paper has pushed for more "equitable" treatment of provinces, which suggests there will be some redistribution of seats but not necessarily equal treatment of the provinces. As one can see from the foregoing, there is much to debate and discuss on this recommendation, and I have not even mentioned the proposed power to approve certain appointments!

C. COUNCIL OF THE FEDERATION

Another major institutional change under consideration is establishment of a new decision-making body called the Council of the Federation. The proposal under discussion today is tantamount to entrenching a system of executive federalism in the constitution, an approach I certainly support.

The reality of Canadian federalism is that succeeding federal and provincial governments have worked together to solve many of our country's problems. While we may tend to think in terms of "watertight compartments" in the constitution, the reality of modern government is a growing interdependence. As reported by the Spicer Commission and reflected in the federal proposal, the public favours elimination of program duplication and disentanglement of overlapping jurisdiction. But, this is not always possible. In some areas such as fiscal policy, environment, or economic development, intergovernmental discussion and co-operation are essential to produce harmonious policies. The fact of the matter is that despite our differences and conflicts we keep returning to the model of executive federalism because it has been an effective way of resolving intergovernmental disputes and a means of seeking common ground.

The question which inevitably arises is, can our constitution and political system sustain both Senate reform and a Council of the Federation? In my view the answer is yes because they do not overlap with respect to their responsibilities. A reformed Senate as outlined in no way diminishes provincial legislative responsibilities under the constitution. It makes the government of Canada more sensitive to provincial and regional interests in developing its legislative program, but always within its constitutional sphere. I agree that there is always the potential for a clash between the representatives of the

provinces in the Senate and provincial governments. But, the responsibilities of the Council are clearly linked with spheres of provincial legislative authority and do not depend upon actions taken by the Senate. The possibility of competing interests will need to be taken into consideration when both institutions are examined.

D. SECURING THE ECONOMIC UNION

Of the various provisions contained in the federal proposal I suspect those relating to the economic union are among the most important to the federal government. First of all, what is an economic union? Essentially, it is seeing Canada as a common market where there should be the free and unimpaired movement of goods, services, capital, and people throughout the country. But, Canada is a federal system, and both the federal and provincial governments have responsibilities to manage their respective economies. Over time provinces have established a variety of policies and practices which impede free market forces. While Parliament's authority over trade and commerce is extensive, it is not sufficient to curb many of these practices.

While there is a common market clause in the constitution — s. 121 — it has not served as the kind of constitutional restraint to provincial activity one might expect. As a result of its rather limited scope the federal government has recommended an expansion of this clause to prohibit any barrier to the free movement of goods, services, capital, and persons. This sweeping constitutional provision would apply to both the federal and provincial governments. There are to be exceptions, however, for federal laws "enacted to further the principles of equalization or regional development." Provinces also get a measure of relief with respect to their efforts to eliminate regional disparities within the province provided there is no extra-provincial advantage established. Finally, there can be other federal or provincial exceptions if sanctioned by the Council of the Federation.

This new clause will have enormous implications for a wide range of provincial government policies including agricultural supply marketing boards, procurement, product standards, and licensing of professions, to mention some examples. While few would find fault with the principle behind the desirability of such a clause, i.e. economic integration, the question arises whether there are non-constitutional alternatives such as uniform legislation or commitments to reduce such barriers. The answer is yes, and they need to be weighed against such a sweeping clause in the constitution. While the exceptions are understandable, they lay the foundation for a great deal of controversy and future litigation. For example, I don't see how federal procurement policies could be challenged as long as they were linked to regional development.

I am sceptical about the chances of this clause being approved in the time available. It is so all-encompassing that I would be surprised if most provinces did not demand an opportunity to discuss it in greater detail if for no other reason than to seek clarification. Whether or not there should be other exemptions was left to the parliamentary committee to explore. While it is clear that barriers to trade should be eliminated or curtailed, it must be remembered that many provincial policies are often developed for social reasons and not for purposes of economic efficiency. To me this is a highly centralizing feature of the federal constitutional package. In my view, the effect on the provinces is far greater than on the federal government and, accordingly, one can expect them to question the clause.

E. SECTION 91A

The companion provision to the new common-market clause is one which would give Parliament an exclusive authority to "make laws in relation to any matter that it declares to be for the efficient functioning of the economic union." Before Parliament could exercise its authority it would first need the approval of two-thirds of the provinces representing fifty percent of the population. The forum for securing approval is the Council of the Federation. It must be appreciated that the threshold of support is identical to that found in the amending formula. Consequently one might conclude that the new federal authority will be used infrequently and when it is, the same objective could be achieved through the amending formula — so why worry?

There is a worry, however, and a word of caution. To insert this amendment into the constitution will require two-thirds of the provinces representing fifty percent of the population. That means at least seven provinces must agree to it, and one must assume those seven have fully considered its implications. But what about the other three? Unless they specifically register their dissent under the provisions of the 1982 amending formula they will be subject to s. 91A. In other words, if a province wishes to object to this new federal legislative power the time to register its dissent is before the proposed amendment is proclaimed. Dissenting provinces then have available to them the opting-out provisions of the amending formula found in s. 38(3). There is no way whatsoever that Québec will accept this clause as it is now drafted. This fact means that Ontario will have the final say on its insertion into the constitution since without it the fifty percent threshold is not fulfilled.

The draft which is being considered provides for a province to opt out once for a three-year period. After

that the objecting province would be subject to the federal authority whether it liked it or not unless it had previously exercised its right to declare the amendment non-applicable. Those who accepted the amendment will have waived that right by accepting it.

If the federal government expects the clause to be accepted it will need to make at least two modifications to the proposal. First, allow for provinces to opt out for a fixed period and agree that opting out can be renewed an indefinite number of times. Second, require the federal legislative authority to be renewed periodically, say every five years. Why? One reason is that it will allow those provinces which have agreed to a transfer to change their minds — particularly after a change in government. It will also allow for fine-tuning of the federal legislative authority. It also means that there is clear recognition that the provincial legislative authority is only temporarily borrowed. There are some strong parallels here to fiscal arrangements which have been the subject of five-year reviews over the past fifty years. Unless changes along the lines I have suggested are added, section 91A has no chance of being adopted. Few, if any, provinces will be prepared to write a blank cheque.

Assuming good intentions on the part of the federal government, I am gradually coming to the conclusion there is simply too much on the table at this time. Moreover, the agenda is expanding, with matters such as a social charter being added by Ontario and equalization and Established Programs Financing being added by Manitoba. There has been no mention of removing the federal government's powers over disallowance and reservation or of providing a provincial role in international affairs, all of which have been discussed before. It is difficult to see when agenda-building will end. Everything cannot be discussed at once and everything cannot, and should not, be in the constitution. We are better off leaving things out and leaving them to the political process than inserting them into the constitution. The constitution cannot solve all our problems.

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This text is excerpted from Professor Meekison's Belzberg Lecture, delivered at the University of Alberta, November 14, 1991. The full text of the Belzberg Lecture, "Canada's Constitutional Crisis" is forthcoming in *Constitutional Studies 1991* (1992) XXX Alberta Law Review. [ed.]

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5. Alan C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" *Canadian Public Policy*, Vol. XIV, Supplement (1988).
6. Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada*, (Toronto: University of Toronto Press, 1985).
7. See Alberta, Select Special Committee on Upper House Reform, *Strengthening Canada: Reform of Canada's Senate*, (Edmonton: 1985); Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation: The Canadian Partnership*, (Calgary: Calgary West Foundation, 1981).

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THE ENVIRONMENT

SHAPING CANADA'S FUTURE TOGETHER or A DOOMED ATTEMPT TO ESCAPE FROM REALITY

Elaine Hughes

From space, we see a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery, and soils. Humanity's inability to fit its doings into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life-threatening hazards. This new reality, from which there is no escape, must be recognized — and managed.

This quote is taken from page 1 of *Our Common Future*,[1] the 1987 report of the World Commission on Environment and Development. This Commission spent five years synthesizing the ideas of thousands of people from around the world in order to prepare their report: a document of nearly 400 pages which explains and illustrates the links between environmental degradation and current development patterns. Its conclusions may be summarized as follows: that we must change our current patterns of development and integrate environmental concerns into every sector of our political and economic institutions, or risk the very survival of life on earth. This new pattern of development — sustainable development — requires that the "ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, and other dimensions."[2] Every time. Starting now.

The Canadian federal government has stated publicly that it wholeheartedly endorses sustainable development. Indeed, as part of the new federal proposals for constitutional reform, our government has suggested that sustainable development is one of the fundamental characteristics of Canada and one of the underlying values of Canadian society.[3] It is hard to imagine a policy proposal of greater significance than the amendment of our constitution, so, of course, one might expect that the environmental implications of these proposals would be carefully considered — given the reality that sustainable development is a prerequisite for survival and that it will require "far-reaching changes to produce trade, capital and technology flows that are more equitable and better synchronized to environmental imperatives."[4] Yet an examination of the federal constitutional proposals reveals little by way of environmental protection and much that is environmentally dangerous, leaving one to wonder whether the drafters of the document have ever even read the World Commission report. Sustainable development does not mean sustaining current development levels or patterns, or putting economic prosperity first.

In 1990 a special committee of environmental law experts submitted a report to the Canadian Bar Association.[5] The Committee's mandate was to identify "key national and international law reform issues and (make) recommendations to promote sustainable development in Canada."[6] Its report suggested federal leadership was "urgently required" and 197 recommendations were made for federal environmental law reform.[7] To give a few examples, it was suggested that the federal government:

- o adopt a comprehensive national environmental agenda
- o establish minimum national environmental standards
- o expand the federal environmental impact assessment (EIA) process to include all new and existing initiatives, including policy, planning, expenditures, regulatory activities, permit practices and cost-shared programs
- o provide citizens with environmental rights, including constitutional rights to a healthy environment
- o develop legislation on solid waste management
- o increase regulation of toxic substances and move toward both pollution prevention (not control) and zero discharge standards
- o increase regulation of pesticides
- o develop alternative energy sources
- o develop strict marine pollution controls including coastal management programmes
- o prohibit water diversions for export
- o increase regulatory activity over pulp mills, forest harvesting and silviculture
- o increase control over fisheries and endangered species management
- o generally, increase the legislative and regulatory role relating to environmental protection including enforcement and compliance.

I would like to review briefly some of the specific proposals for constitutional reform to determine whether the federal government is heeding this advice about how to achieve sustainable development. I will limit my discussion to the proposals relating to the division of powers, including legislative inter-delegation.[8] As an aside, I should make clear my underlying premise that federal — provincial jurisdictional arguments ought not to be considered a justifiable excuse for government inaction in relation to environmental concerns, given that what is at stake is the "survival of the planet."[9]

First, the federal government is "prepared to recognize the exclusive jurisdiction of the provinces" in relation to tourism, forestry, mining, recreation, housing

and municipal/urban affairs. Under the existing constitutional regime the provinces already exercise primary jurisdiction in these areas due to their powers over 'public lands,' 'municipal institutions,' 'property and civil rights' and 'development, conservation and management of non-renewable natural resources and forestry.' So one might say that this is an empty proposal which means nothing from an environmental viewpoint.

Yet all of these areas have major environmental impacts. It may mean *something* to give 'exclusive' jurisdiction over forestry to the provinces, rather than their existing power to enact laws regarding 'development, conservation and management.' For example, how would this affect federal laws regulating pulp mill discharges into watercourses? Are pulp mill discharges part of 'forestry'? If so, would the federal laws become more vulnerable to challenge or, generally, lose the source of their constitutional validity?

If we give *exclusive* jurisdiction to the provinces, what happens to the impetus for developing national standards or a national forestry policy? What happens to the recommended increased role of the federal government in relation to harvesting and silviculture operations? Where is the increased federal role in environmental impact assessment? Can we continue to hold the federal government partially accountable for the way our forests are managed? Perhaps this subtle tinkering with legislative jurisdiction does nothing to the *status quo* but, if it does, it is hard to determine exactly what its effect is. Currently, the federal government can influence forest management via its use of the spending power and its 'trade and commerce,' 'peace, order and good government' (POGG) and 'fisheries' jurisdictions. Could provincial jurisdiction over all of 'forestry' result in a redefinition of the scope of such powers? Certainly, the proposal does nothing to clarify the extent of federal jurisdiction, and may in and of itself stifle federal initiative, particularly initiative which involves unilateral federal action.

One of the other constitutional reform proposals is to limit conditional transfers and the exercise of the federal spending power in areas of 'exclusive' provincial jurisdiction (unless 7 + 50 provincial approval[10] is obtained). By increasing the list of 'exclusive' provincial powers in environmentally-relevant subject areas, there is no doubt that in these areas the federal role in influencing policy through conditional grants and shared-cost programs could be inhibited. Environmental initiatives are usually costly and impeding the use of the federal spending power not only limits federal influence, but leaves provinces — including poor provinces — to try to pick up the tab. With more provincial control, but less federal money, some provinces simply could not proceed with better environmental protection even if they wished to do so. While bilateral arrangements are still possible, at some point a number of bilateral agreements become a nation-wide program and open to scrutiny if the 7 + 50 standard is not met. Conversely, nation-wide shared cost programs are never initiated without substantial provincial agreement, so we may have another meaningless amendment which does not change the *status quo* in any readily definable way.

Second, we have two proposals designed to alter federal legislative jurisdiction which are relevant to environmental protection: the addition of s. 91A (power to manage the economic union) and 'clarification' of the federal residual power (POGG).

In relation to POGG, the federal government intends to retain its jurisdiction over national matters and emergencies, while transferring to the provinces authority for non-national matters unless specifically assigned to the federal Parliament in the constitution or by the courts. Environmental problems change over time and past experience shows that they frequently move from local matters to problems with regional, national or international implications. Under both the existing POGG clause and the new proposal, once a matter is 'national' in scope, the federal government can assume jurisdiction. Is this more meaningless tinkering? Or could it have adverse implications for issues such as the federal role in an expanded EIA process? What does this do to the recommended federal action in relation to solid waste management, including municipal waste? What about national enforcement and compliance standards for all environmental laws? At a minimum, nothing has been done which would help citizens, government or the courts decide when an issue has reached a 'national' dimension so as to justify federal intervention. Continued uncertainty about how to tell when a matter is 'national' means that nothing has been done to either encourage federal leadership, or discourage the use of jurisdictional arguments as an excuse for inaction.

Section 91A is designed to create a new federal power to manage the 'economic union', subject to 7 + 50 provincial approval; provincial ability to 'opt out' is also suggested. Given the links between economic matters and environmental issues this provision has enormous environmental implications. Undoubtedly, this could limit unilateral federal initiatives under the general trade and commerce power and thus might inhibit the expansion of federal EIA or the introduction of new measures in relation to fisheries, forestry, water export and other resource developments. Again, we see a provision which has the potential to stifle unilateral federal initiatives which might be environmentally advantageous. In addition, there is nothing in the proposal, or the mandate of the proposed Council of the

Federation which would oversee its use, which requires the government to consider the environmental impacts of economic decision-making.

Finally, there is the proposal for legislative inter-delegation. This, effectively, permits bilateral federal-provincial agreement to delegate legislative authority between levels of government over any issue which seems politically desirable, regardless of whether it is environmentally desirable. This circumvents the need for future constitutional amendments to transfer legislative powers, including powers over the environment. EIA is the obvious candidate for transfer to the provinces, given that Conservative House Leader Harvie Andre was reported to have said that the federal government "wants to leave the provinces as the primary decision-makers on developments that don't cross provincial boundaries" and specifically expressed concern over duplication of environmental review processes.[11] Areas targeted by the federal government for 'streamlining', probably under the proposed inter-delegation power, include wildlife conservation, transportation of dangerous goods, soil and water conservation, and inspection programs in areas such as fisheries.

Again, one might say that nothing is done here that could not be done by administrative inter-delegation under the current constitution although, arguably, a legislative inter-delegation is more cumbersome to repeal. Presumably inter-delegation could be used to *add* to federal environmental powers so that sustainable development goals could be reached. Yet, viewed in concert with the previous provisions and in light of the current federal government's not-so-hidden agenda as expressed by the House Leader, it seems that *provinces* are given an increased role while the federal government gets to save substantial sums of money — money it would otherwise need to spend on the enormously expensive implementation of sustainable development. If provinces overexploit resources or cannot take effective action due to the costs involved in environmental protection, the federal government may have a nice excuse for inaction (it's now a provincial responsibility). Thus, these proposals seem to be in direct opposition to the recommended and "urgently required" federal leadership in environmental issues.

To summarize, I would say that the new constitutional reform proposals do not involve a radical change to the existing division of powers. That is a major flaw. Nothing has been done to clarify environmental jurisdiction. Nothing has been done to expand federal jurisdiction to permit a national environmental agenda to be implemented. The option of express concurrent jurisdiction has not been explored. If anything, some of the measures may well dampen federal initiative and provide further excuses for inaction.

My primary suggestion in relation to the constitutional reform proposals is this: we should do a full environmental impact assessment of the entire reform package. Only in this way can we fully explore in advance what the environmental implications of this proposal might be and integrate environmental considerations into our decision-making as required by our "commitment to the objective of sustainable development." In addition, we must consider amending the proposal to ensure that environmental jurisdiction is clarified, to eliminate disincentives to decisive government action, to consider the merits of particular changes (such as requiring an EIA before permitting legislative interdelegation) and to consider the inclusion of a constitutionally-protected right to a healthy environment.

Life on earth may be in jeopardy if we cannot change our development patterns and become environmentally responsible. This is reality according to the World Commission on Environment and Development. We must stop parroting their words in a "Canada clause" that has all the substance of Santa Claus. Canadians deserve some action now. The citizens of this country need to tell our federal government to quit trying to escape from reality and get started on the job of *truly* shaping Canada's future together.

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1. World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).
2. *Ibid.* at 39.
3. *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 9-10, proposes that the "Canada clause" in s. 2 of the Constitution entrench a "commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations."
4. WCED, *supra* note 1, at 41.
5. *Sustainable Development in Canada: Options for Law Reform* (Ottawa: CBA, 1990)
6. *Ibid.* at (i).
7. *Ibid.* at 27-54.
8. There are several other provisions in the constitutional proposals of environmental concern. For example, the proposed property rights clause in the Charter raises concerns about the validity of environmental standards that restrict certain uses of private property. Also, the proposed common market clause (s. 121) might invalidate any environmental standards that could be construed as trade barriers.
9. WCED, *supra* note 1, at 23.
10. Approval of at least 7 of 10 provinces representing at least 50% of the Canadian population.
11. M. Tait, "Environment Under Review" *Calgary Herald* (28 September 1991).

DELEGATION POWER

THE DELEGATION POWER PAST AND PRESENT

David Schneiderman

INTRODUCTION

In the aftermath of the Meech Lake Accord, there is still lingering suspicion on the part of Canada-outside-Québec about the "distinct society" clause and everything that "distinctiveness" entails. Recent public opinion polls show that, while there now is less equivocation about including the clause directly in the text of the Charter and in the proposed "Canada Clause", opposition to it continues to run deep if it means more power to, and 'special status' for, Québec.[1] This sentiment endures despite the apparent single-mindedness of Québec's political, economic, and cultural elites that a far more serious devolution of power will be required to salvage the union and forestall a referendum on independence in Québec.

Perhaps, the drafters of the federal proposals saw in the proposed delegation power a way out. The clause could enable the federal or provincial governments to transfer to the other jurisdictional responsibility for any number of matters which strict adherence to the text of the constitution would prohibit. This bilateral transfer of power could skirt around the rigours of the amending formulae and, all the while, remain faithful to the notion of the equality of the provinces. It is the latter which Alan Cairns, for example, has identified as a powerful rhetorical tool, both in the fight to thwart Meech Lake as well as in this round of reform.[2]

While the language of a delegation power can maintain the appearance of provincial neutrality — each province has equal opportunity to strike a deal — it is in practice that the clause will grate against the equality "principle". For it is ultimately with Québec that the federal government will be expected to negotiate arrangements for the delegation of power, likely in the direction advocated by the Liberal Party of Québec in the Allaire Report. The recent constitutional conference on the division of powers in Halifax embraced the notion of asymmetrical federalism, and it is with the aim of achieving less symmetry that the power likely now will be employed. This has not always been the intention of those who in the past have recommended the creation of just such a power. And, as the aim of legislative delegation has shifted, so has the appeal of such a proposal to appease aspirations within Québec for greater jurisdictional room. The aim of this essay is to explore some of the historical roots of the proposed delegation power, and consider those past proposals in light of current political and constitutional conditions.

PAST PROPOSALS

Attempts at delegating legislative power directly between the two orders of government — federal and provincial — have been thwarted by judicial interpretation. The courts defined sections 91 and 92 as largely carving out mutually exclusive spheres of jurisdiction, with some areas of concurrency.[3] The courts would not permit excercise of powers beyond legislative jurisdiction,[4] even where consent to such excercise was given through the development of cooperative, inter-governmental schemes. This was the case, for example, in early attempts at creating an old-age pension scheme[5] and marketing schemes for certain products.[6]

As a result of these restrictive interpretations regarding, particularly, federal powers over economic matters, the Rowell-Sirois Report recommended that a delegation power would be a "useful device" for overcoming these constitutional deficiencies: "Unified control and administration in the hands of a single government is sometimes desirable".[7] The report recommended a delegation power that would permit transfers of power in specific instances from the provinces to the federal government, and vice versa. But, written as it was in the wake of the depression of the '30s, it is likely that Rowell-Sirois had more in mind the former than the latter.

The issue of legislative delegation was dealt with conclusively in the 1951 *Nova Scotia Inter-Delegation* case,[8] where the Supreme Court struck down a proposed scheme which would have permitted the delegation of jurisdictional responsibilities from the province of Nova Scotia to Parliament, and vice versa, including a power to impose an indirect sales tax, if Parliament so agreed. This transfer of plenary jurisdiction over matters assigned "exclusively" to either level of government amounted, for the Court, essentially to an amendment to the constitution.[9] While Parliament or the legislatures could delegate responsibilities to subordinate agencies, they could not "abdicate their powers" and invest jurisdiction in bodies not empowered to accept such delegation.[10] The decision came under stinging criticism for the Court's failure to appreciate the nature of legislative delegation;[11] it was not an abdication of power, but an "entrusting...of the excercise of power...*with complete power of revocation or amendment remaining in the delegator.*"[12]

The direction of the transfer, from the provinces to the federal government, began to change even before the matter was taken up again in the constitutional conferences of 1950 and then again, more specifically, in the Fulton-Favreau proposals. The issue of a new delegation power was raised, and strongly promoted, by Premiers Macdonald of Nova Scotia and Douglas of Saskatchewan at the January 1950 Constitutional Conference of Federal and Provincial Governments. The matter then was referred, together with the larger question of an amending formula, to the Standing Committee of the Constitutional Conference.[13] Favreau reports in his *Amendment to the Constitution of Canada* that such a provision was proposed to circumvent the unanimity which likely would have been required in amending formulas being discussed at the time.[14] The matter dropped off the table in subsequent conferences,[15] and was not revived again until the early '60s.

The Fulton-Favreau proposal in 1960-61 included a new power to delegate in an amended s. 94 of the *British North America Act*,[16] and it is used as the failed benchmark for future proposals. It permitted instances of delegation from the provinces to the federal government in only a number of provincial matters, including the very broad power over property and civil rights, and unlimited transfers of federal matters to the provinces. The delegation would take the form of a statutory scheme, and no statute could take effect without the consent of a number of legislative assemblies and Parliament. In order for any delegation, in either direction, to occur, at least four provinces normally would have to participate. If other provinces did not participate, in the case of a provincial transfer to Parliament, Parliament had to declare that it had consulted with the governments of all of the provinces, that the statute in question was of concern to fewer than four provinces, and that those provinces had consented to the delegation. As delegation did not signify abandonment of jurisdiction, provisions were made for the revocation of consent by the delegator and the repeal of statutes.[17]

The formula was cumbersome and impractical: as William Lederman wrote, the delegation proposals were either "dangerous or useless."[18] Moreover, wrote Lederman:[19]

> Certainly it can have no attraction to those who desire to develop a particular status for Québec, because the consent of four Provinces would be required for a delegation of federal powers, and where are Québec's three companions in the circumstances?

In the meanwhile, the courts became more receptive to the idea of delegation through administrative channels. Federal schemes, for example, which delegated regulatory responsibility to provincial administrative agencies were constitutionally permissible,[20] as was a federal statute which delegated wholesale responsibility for licensing to provincial transport boards.[21]

These devices provided the kind of flexibility demanded of modern societies with divided jurisdiction. Compared to previous proposals for a delegation power, the "practical result achieved by the courts", wrote Gerald La Forest, "may well be as good as we are likely to get."[22]

Nonetheless, subsequent proposals for a delegation power were included in the 1979 Pepin-Robarts Report,[23] which recommended recognition of the power to delegate "by mutual consent, legislative powers on condition that such delegations be subject to periodic revision and be accompanied where appropriate by fiscal compensation."[24] The Québec Liberal Party "Beige Paper" recommended such a power which could be used for specific purposes, for a limited duration, and ratified by a new Federal Council.[25] The Macdonald Commission on the Economic Union also recommended amendment to the constitution to permit legislative delegation.[26] More recently, the Beaudoin-Edwards Committee appointed to study the process for amending the constitution of Canada in the wake of the death of Meech Lake, "strongly" recommended that the joint parliamentary committee study the question "in the framework of the division of powers."[27] This was necessary because Beaudoin-Edwards advocated the adoption of an amending formula which employed four regional vetos. This was the kind of unanimity requirement the Premiers in 1950 feared would stifle constitutional change and which generated the exploration for a delegation mechanism.

PRESENT CONCERNS

Many of the concerns which motivated a delegation power have been alleviated by the 1982 amending formulae. No province (except for the few matters listed in s.41) has a veto over constitutional change: transfers of legislative power can be accomplished with the assent of at least seven provinces representing at least fifty percent of the population. It could be argued that some of the work of a delegation power can be accomplished using the s.43 amending formula, amendments involving one or more, but not all, of the provinces.[28] None of the formulae, admittedly, have the flexibility which can be gained by legislative delegation.

Moreover, much of what the courts may have prohibited in the past, and which fuelled discussion of a delegation power, can now be accomplished by

administrative delegations and incorporations of another jurisdiction's legislative schemes by reference. As Peter Hogg describes the present situation, what could not be done directly can now be done indirectly.[29]

What are some of the aims, then, that can be served by the proposed delegation power? As the Allaire Report suggests, jurisdictional responsibility could be streamlined to make more "efficient" the economic union, so as to reduce overlap or gaps in power. But, streamlining could flow not only from Parliament to the provinces.[30] For example, provinces could consent to a federal scheme for securities regulation. Equity concerns could be addressed: for example, provinces could consent to having Parliament legislate directly over child care in order to institute a national day-care strategy. But, what if some provinces decline to participate in the delegation to Parliament? These concerns were raised in the economic union context by A.E. Safarian:[31]

> Frequent resort to delegation could bring about disparity in supposedly national programs with common market objectives in the event that one or more provinces declined to delegate. In the face of changing economic conditions and changing federal and provincial perceptions of interests, it places a heavy load on negotiation between governments to achieve consistency on a continuing basis.

Perhaps the most practical application of the delegation power would be in one-on-one circumstances, where the exigencies of one province call for immediate, but revocable change. Or, it can facilitate the idea of federalism as a social laboratory. Premier Tommy Douglas, at the 1950 constitutional conference, described the delegation power as "a useful means for testing action by results, which may be very important in affording evidence to whether there should be a permanent transfer of legislative jurisdiction from the dominion to the provinces or vice versa."[32]

Further, what are the implications for political accountability? Professor Lederman, as already noted, characterized the power of legislative delegation as "dangerous".[33] He feared the obfuscation of jurisdictional responsibilities which would result from frequent use of the delegation power:

> It would be all too easy to engage frequently in such delegation under strong but temporary political pressures of the moment, thus creating a patch-work pattern of variations Province by Province in the relative powers and responsibilities of the federal and provincial legislatures. This could seriously confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions.

Transfers of legislative power could confuse, and confound, the citizenry about who is responsible for what. Moreover, the consultative and consensual nature of a delegation power can dull otherwise imaginative and progressive legislative schemes. This critique should be of considerable concern in any democracy, particularly one based on federal principles.[34] But, it could be that Lederman presumes too little: that the Canadian public is not conscientious and vigilant enough to ascertain those spheres of responsibility when necessary and then take to account those responsible. He may also presume too much: that the Canadian public already has a clear conception of jurisdictional responsibilities which would be undermined by legislative delegation.[35] The complaint also assumes that this intermeshing of responsibilities has not already been achieved, to some degree, under the present constitutional arrangements; an assumption which Hogg, among others, discredits.[36]

THE PRESENT PROPOSAL

Safeguards

It is presumed that delegations will occur as has been described in earlier proposals: each delegation will be for specific purposes and pursuant to statute. What otherwise could have been accomplished pursuant to constitutional amendment, could become a *de facto* amendment. In other words, once having delegated power, it may be unlikely that such power would be reclaimed back. Justice Rand foresaw this possibility in the *Nova Scotia Inter-delegation* case: "Possession here as elsewhere would be nine points of law...The power of revocation might in fact be no more feasible, practically, than amendment" of the constitution.[37] If that would be the practical effect, if not the intention, of delegation, it would be highly inappropriate to avoid the constitutional requirements for amendment. For this reason, it would be appropriate to have a sunset clause of, say, five years included in any statute which gives effect to a delegation.[38] The legislatures would have to re-visit this delegation every five years, as required when opting out of Charter rights and freedoms under s.33, then debate and decide either to renew or let lapse their legislative commitment to this delegation. Repeal of delegation statutes, or revocation of consent, could occur prior to the five year period, with proper notice.[39] No delegation, it could be argued, is thereby permanent, rather, the emphasis is on the nature of delegation as borrowed jurisdiction.[40]

Concerns over financial compensation for accepting a delegation will arise. The Pepin-Robarts Report suggested that, where appropriate, financial

compensation follow the delegation. The Québec Liberal Party in 1980 also preferred that the government delegating continue to assume the financial burden of the activities delegated. Given the temporary shifting burden involved in delegation, it would be sensible that financial responsibility reside with the delegating jurisdiction, and that in most cases equivalent fiscal resources be made available to the receiving jurisdiction to carry out its new responsibilities.

And, in order to overcome the objections raised in the *Nova Scotia Inter-delegation* case, that the division of powers in the constitution assigns the power to make laws "exclusively" to either Parliament or the provincial legislatures, it would be advisable that any amendment take the form of a notwithstanding clause. This was proposed in the Fulton-Favreau formula and by the First Ministers in April 1981.[41]

Could, as the Canadian Bar Association suggests, the federal government transfer jurisdiction over "Indians and Land reserved for Indians" under the proposed power?[42] Aboriginal peoples look first to the federal government for the honouring of treaty obligations and aboriginal rights: they have a "principal and special relationship with the federal government...[the] relationship with provincial governments is secondary."[43] The Supreme Court of Canada has described this special relationship as "trust-like", "requiring a high standard of honourable dealing" on the part of the federal Crown.[44]

Section 35.1 commits the government of Canada and the provincial governments to convene a constitutional conference to which aboriginal representatives will be invited to participate in the event that "any amendment" is proposed to be made to s.91(24) of the *Constitution Act, 1867*. As the delegation is not an "amendment", s.35.1 offers little protection to aboriginal peoples who, as long as they remain a "subject matter" under s.91(24),[45] could be subject to legislative delegation. As a result, it is imperative that any delegation power between the federal and provincial governments exclude a s.91(24) transfer or that s.35.1 be amended to include delegations and beefed-up to give aboriginal peoples a vote at the conference table.[46]

Consideration could also be given to delegations between aboriginal governments and the federal or provincial governments. While this would not satisfy completely demands for full control over local aboriginal government, it could provide the opportunity for future cooperation and experimentation.

Amending Formula

Henri Brun, in his testimony before the National Assembly Commission to Study All New Constitutional Offers, suggested that the federal proposal for a new delegation power would trigger the rigours of the unanimity formula. He argued that, as this was an enabling provision which permitted future re-divisions of power, this would be an amendment to the amending formula, requiring the unanimous approval of all of the provinces.[47]

This is an interesting, and somewhat compelling, argument. One's conclusion may turn on how one characterizes the purpose or intent behind the amending formulae. The amending formulae concern: amendments affecting only Parliament or only the provincial legislatures; amendments of concern to Parliament and all of the provinces; and amendments which concern Parliament and one or more but not all provinces. The formulae which apply to amendments of concern to Parliament and all of the provinces, or one or more but not all provinces, provide a method for changing the distribution of powers and certain national institutions. The formulae are concerned only with *permanent*, as opposed to *temporary*, changes to jurisdiction or national institutions. But, delegations are only temporary; ultimate jurisdiction continues to reside as mandated in the constitution. In this way, the delegation operates as does the proposed spending power provision: both will permit temporary alterations of spheres of jurisdiction. Those alterations will be by ordinary statute, subject to repeal, perhaps with notice, in the ordinary way. With appropriate safeguards, the proposed delegation power should be seen as enabling administrative agreement between two levels of government, and not an amendment to the amending formula.

Another response may be to argue that the proposed delegation power would not be included in Part V of the *Constitution Act, 1982*, and would not be, thereby, "an amendment to this Part". It may be significant that previous proposals, such as the Fulton-Favreau formula, suggested that the power be included as an exception to ss. 91 and 92 and be placed in either sections 93 or 94 of the 1867 Act. But, this does not directly address the concerns raised by Professor Brun.[48]

It is worth noting that, if Brun is correct, and temporary transfers of jurisdiction are included in the amending formula, not only would the delegation power be caught by unanimity, but so would the proposed spending power, the enabling provisions for agreements regarding culture and immigration, and possibly the new federal power to make laws for the efficient functioning of the economic union.

CONCLUSION

In the present political context the delegation power can achieve some of the aims of the Québec government, namely, devolution of responsibility from Parliament to the Québec National Assembly in a number

of key areas. Peter Meekison, for example, cites unemployment insurance as a subject matter ripe for transfer under a new delegation power.[49] Other likely candidates could be communications, marriage and divorce, or even the power of indirect taxation.

Will this kind of asymmetry be politically acceptable to a public already deeply suspicious about the substance of constitutional reform in so far as it meets Québec demands? At the Halifax constitutional conference on the division of powers, reaction to this proposal "was largely negative". Some called it "back door asymmetry". On the other hand, the conference delegates preferred that Québec's aspirations be met more directly through administrative, rather than legislative, delegation or a direct transfer of specific powers.[50]

Would the proposed delegation power satisfy the concerns of the government of Québec? Past proposals for legislative delegation made clear that legislative transfers were only available through specifically approved statutory schemes, revocable on the insistence of either party. And, concerns about the transfer of financial compensation related to the delegation remain unclear. This hardly qualifies as the type of "profound change" the Bélanger-Campeau report calls for;[51] it provides neither the stability or autonomy called for in the Allaire Report as guiding objectives in the new political and economic order.[52]

In the result, it may be that the proposed delegation power, arising long after the crisis which precipitated its consideration; after other forms of delegation have succeeded in achieving similar objectives; after an amending formula is in place which does not require unanimity for general redistribution of powers; and after demands from the province of Québec have outstripped any accommodations which may have been available under a federally-controlled delegation power, will be relegated to the backwater of constitutional amendments, available, when necessary, for administrative convenience but with little contemporary resonance.

But, it could also result in more effective and creative governance. The delegation power furthers the aim of federalism, providing "laboratories for different types of public policy"[53] which may be more responsive to the demands of differing political communities within Canada.

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1. See "Breaching the Barriers" *Maclean's* (6 January 1992) 54.
2. See Alan Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McLelland and Stewart, 1991)
3. See W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967) 45 Can. Bar Rev. 408 at 417.
4. See Lord Watson in *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367 quoted in Lefroy, *Canada's Federal System* (Toronto: Carswell, 1913) at 70.
5. *A.G. Can. v. A.G. Ont.*, [1937] A.C. 355.
6. *A.-G. B.C. v. A.-G. Can*, [1937] A.C. 377. See generally J.A. Corry, *Difficulties of Divided Jurisdiction* (A Study Prepared for the Royal Commission on Dominion-Provincial Relations) (Ottawa: King's Printer, 1939) at 11-20.
7. Donald Smiley, ed., *The Rowell-Sirois Report, Book 1* (Toronto: Macmillan, 1978) at 198.
8. [1950] 4 D.L.R. 369 (S.C.C.).
9. See *ibid.* at 377, per Taschereau J.
10. *Ibid.* at 381-82, per Taschereau J.
11. See, for example, Ballem, Case and Comment, (1954) 32 Can. Bar Rev. 788; Bourne, Case and Comment (1965) 34 Can. Bar Rev. 500.
12. Raphael Tuck, "Delegation — A Way Over the Constitutional Hurdle" (1945) 23 Can. Bar Rev. 79 at 89 (emphasis in original).
13. See *Proceedings of the Constitutional Conference of Federal and Provincial Governments* (January 10-12, 1950) (Ottawa: King's Printer, 1950) at 21 and 37, respectively. The provinces of Manitoba and New Brunswick also supported the proposal.
14. In Anne F. Bayefsky, *Canada's Constitution Act, 1982 & Amendments: A Documentary History*, Vol.I (Toronto: McGraw-Hill Ryerson, 1989) at 45.
15. See *Proceedings of the Constitutional Conference of the Federal and Provincial Governments* (Second Session, September 25-28, 1950) (Ottawa: King's Printer, 1950) at 36.
16. It was also proposed that it be included as s.93A. See Bayefsky, *supra*, note 14, Vol.I at 11.
17. See generally Eugene Forsey, "The Canadian Constitution and its Amendment" in *Freedom and Order* (Toronto: McLelland and Stewart, 1974) 227.
18. *Supra*, note 3 at 427.
19. *Ibid.*
20. *P.E.I Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392.
21. *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569.
22. Gerard V. LaForest, "Delegation of Legislative Power in Canada" (1975) 21 Can Bar Rev. 131 at 147.
23. The McGuigan-Molgat Committee and the Canadian Bar Association both recommended only permission to delegate administrative, and not legislative, powers. See Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, 1972, "Final Report" in Bayefsky, *supra*, note 14, Vol.1 at 260 and Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Ottawa: Canadian Bar Foundation, 1978) at 66-67.
24. The Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Supply and Services, 1979) at 104.
25. The Constitutional Committee of the Québec Liberal Party, *A New Canadian Federation* (Montreal, Québec Liberal Party, 1980) at 71-72.
26. Royal Commission on the Economic Union and Development Prospects for Canada, *Report,* Vol.3 (Ottawa: Supply and Services, 1985) at 256-257.
27. Report of the Special Joint Committee of the Senate and the House of Commons, *The Process for Amending the Constitution of Canada* (June 1991) at 29.
28. See, for example, "An Option if Meech Lake is Not Ratified" (ed), *The Globe and Mail* (27 April 1990) A6. The consensus as to the original intent behind the provision appears to be that it is not available for re-divisions of power under ss. 91 and 92. See J.

Peter Meekison, "The Amending Formula" (1982) 8 Queen's Law J. 99.
29. *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 303. But see E.A. Dreidger, "The Interaction of Federal and Provincial Laws" (1976) 54 Can. Bar Rev. 695 at 700-703.
30. As proposed by F.R. Scott, "Social Planning and Canadian Federalism" in M. Oliver, ed., *Social Purpose for Canada* (Toronto: University of Toronto Press, 1961) at 399.
31. *Canadian Federalism and Economic Integration* (Ottawa: Information Canada 1974) at 104.
32. *Supra*, note 15 at 37-38.
33. *Supra*, note 3 at 426.
34. For the same concerns in the spending power context see Andrew Petter, "Meech Ado About Nothing? Federalism, Democracy and the Spending Power" in K. Swinton and C. Rogerson, eds, *Competing Constitutional Visions* (Toronto: Carswell, 1991) at 190-192.
35. See LaForest, *supra*, note 22 at 146.
36. Hogg, *supra*, note 32 at 300. See also McDonald Commission at *supra*, note 29 at 257.
37. *Supra*, note 8 at 387.
38. *Supra*, note 27 at 104.
39. As the notice requirement may be constitutionalized, it may be distinguished from *Reference re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).
40. See *Laskin's Canadian Constitutional Law*, 5th ed., Vol.1 (Toronto: Carswell, 1986) at 43.
41. Bayefsky, Vol.2, *supra*, note 14 at 812-813.
42. Canadian Bar Association, *Rebuilding a Canadian Consensus* (Ottawa: C.B.A., 1991) at 291.
43. Assembly of First Nations, *First Circle on the Constitution* (November 21, 1991) at 22.
44. See *R. v. Sparrow* (1990), 70 D.L.R. 385 (S.C.C.) at 408-409.
45. This idea is borrowed from Patricia A. Monture-OKanee,"Seeking My Reflection: A Comment on Constitutional Renovation" in D. Schneiderman, ed., *Conversations: Women and Constitutional Reform* (Edmonton: Centre for Constitutional Studies, 1992) at 30.
46. See Andrew Bear Robe, "First Nations and Aboriginal Rights" (1991) 2:2 Constit. Forum 46
47. Québec, Assemblée Nationale, Commission parlementaire spéciale, *Journal des débats* (10 Octobre 1991) CEOC-97.
48. There may be other reasons why a delegation amendment may trigger unanimity, for example, it could be argued the "office of the...Governor General and Lieutenant Governor of a province" is amended. But see Hogg, *supra*, note 32 at 292.
49. "Distribution of Functions and Jurisdictions: A Political Scientist's Analysis" in Ronald L. Watts and Douglas M. Brown, *Options for a New Canada* (Toronto: University of Toronto, 1991) at 279.
50. Atlantic Provinces Economic Council, "Renewal of Canada: Division of Powers Conference Report" (January 22, 1992) at 16.
51. Québec, *Report of the Commission on the Political and Constitutional Future of Québec* (March 1991) at 72.
52. Liberal Party of Québec, Report of the Constitutional Committee, *A Québec Free to Choose* (January 28, 1991) at 25.
53. See Katherine E. Swinton, speaking of the value of diversity in federal jurisdictions in *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 49.

ESSAY

"THE WEST": MYTH OR REALITY IN THE CONSTITUTIONAL REFORM PROCESS?

A. Anne McLellan

INTRODUCTION[1]

For many Canadians, "the West" is apparently not merely a geographic location but short-hand for a common set of constitutional grievances and demands. For those who live outside the West, there is a belief that the four provinces which comprise the region will speak with one, unvarying voice on constitutional matters. For example, many believe (perhaps, including the federal government) that the West wants Senate Reform and, in particular, reform based upon the principal of "Triple E". There is also a perception that the West seeks greater decentralization of power from the federal level to the provincial. As I listen to constitutional experts comment on what will be needed to keep our country together, I am struck, again and again, by the assumption that the West has a common set of concerns and a common set of demands to resolve these concerns. It will be my suggestion that this attitude is dangerously simplistic and probably wrong. As is more apparent as the months go by, the cleavages between the four western provinces are becoming more pronounced. They define the nature of our constitutional crisis differently and proffer diverse solutions for its resolution.

Of course, many Canadians can be forgiven for thinking that the West speaks with one voice. At least since the late 1970s, Canadians outside the region have heard, regularly and forcefully, a litany of Western grievances, most particularly concerning control over the region's national resources and the implementation of the natural energy policy. And of course, few Canadians who witnessed it, will forget the ongoing confrontation between the Premier of Alberta, Peter Lougheed, and the Prime Minister of Canada, Pierre Elliot Trudeau, over these and other matters.

It is my view that during this period (including the constitutional crisis of 1980-82) and up to the mid-1980s when he left office, Canadians outside the region assumed that the views and concerns of Peter Lougheed were synonymous with the concerns of the West. His was the voice heard most frequently, and most powerfully, during this time and for most of us living outside the region, his concerns *were* the West's concerns. It was during this time that Alberta assumed a prominence and influence in constitutional affairs that it only recently may have lost. The effect of this influence was to leave an impression that the Alberta agenda was the West's agenda, thereby creating the illusion that the four western provinces had identical constitutional concerns and demands.[2]

POLITICAL ECONOMIES AND IDEOLOGIES

There are a number of underlying socio-economic factors that I believe mitigate against the four western provinces sharing common constitutional agendas. I'll briefly outline some of them.

In Canada, we rather crudely categorize our provinces as being either "haves" or "have-nots". "Have" provinces are those which do not receive equalization payments from the federal government; these payments being unconditional transfers to less prosperous provinces. Only three provinces in Canada currently can claim this status: British Columbia, Alberta and Ontario. The economic strength and potential of these provinces is much greater than that of "have-not" provinces, such as Manitoba and Saskatchewan.[3] It is, therefore, not surprising to find that both Alberta and British Columbia have argued for greater decentralization within the Canadian federation. These provinces believe they should be left to develop and diversify their own economies, retain more of the benefits therefrom for their provincial treasuries, and establish their own social welfare and spending priorities, with minimal interference or guidance from the national government.

Massive decentralization appears to be of little interest to Manitoba and Saskatchewan; for example, one need only refer to the Manitoba Constitutional Task Force Report of October 28, 1991:[4]

> Our presenters were united in their view that the central government must have sufficient power and authority to redistribute wealth to the benefit of the have-less regions and the less advantaged citizens of our nation. This has been a central and enduring feature of our federal system much admired far beyond our boundaries.

Under the heading, "The Maintenance of a Strong Central Government", the Task Force offered its belief:[5]

> That in a period of intense international competition a strong central government is essential to national well-being. As well, a strong

central government can create a sense of nationhood and association between different parts of the country by supporting effective and visible institutions.

Manitobans believe that all Canadians should be able to share equitably in the resources and benefits of the nation as a whole. A strong central government is required for such programs as equalization, established programs financing (EPF) and the Canadian Assistance Program (CAP). We are concerned, therefore, by federal cutbacks to such programs. While means can be found to ensure that these national programs better reflect the regions, they are essentially national in scope and play a crucial role in preserving national unity.

The Manitoba Task Force Report calls for, at best, a tinkering with the present distribution of power. While I do not suggest that British Columbia and Alberta support the vision of a decentralized Canada propounded in the Allaire Report of the Québec Liberal Party,[6] it is fair to say that both provinces have argued for a decentralization of powers that goes well beyond that endorsed by the Manitoba Task Force Report.

The recent comments of Howard Leeson, a former senior advisor to the New Democratic government of Alan Blakeney in Saskatchewan, are also revealing in this regard. At a recent conference on the Constitutional Futures of the Prairie and Atlantic Regions, he was quoted as calling for "an agenda directed towards small farmers, workers and other powerless groups in the West."[7] He went on to say: "Such an agenda would guarantee a role for the national government in helping the economically subordinate regions."[8]

In addition, both Mr. Leeson and the Manitoba Task Force Report call for a strengthening of the equalization section of the constitution, as such a provision operates as a form of insurance for poorer provinces.

These comments reflect the economic reality of the provinces of Manitoba and Saskatchewan. Because the fiscal position of these provinces is such that they are net beneficiaries of federal transfer payments, they will not support any significant diminution in the ability of the federal government to redistribute wealth, be it through equalization, shared-cost programs, procurement programs, etc.

One should also be aware of the different sources of economic prosperity in the four western provinces. While it is true in general terms that the four provinces depend largely upon the exploitation of natural resources for their economic well-being, there are significant differences in relation to the nature of these natural resources and the markets for them. For example, in a recent paper, Chambers and Percy document the following:[9] approximately 50% of Alberta's total exports come from crude petroleum and natural gas. In British Columbia, approximately 50% of that province's total exports come from the forest; in Saskatchewan, wheat represents 27% of the province's total exports, with crude petroleum representing 20% and potash 13%. Manitoba presents quite a different picture, with only 23% of its exports coming from natural resources (wheat - 14%; nickel and alloys - 6.12; canola - 3.17%).

The distinctive nature of Manitoba's economic base has led Professor Paul Boothe to question whether its economic interests might not be more closely aligned with those of Ontario than those of the other three western provinces.[10]

As these statistics point out, despite the importance of the natural resource and agricultural sectors in each of the western provinces, significant economic diversity exists between them. Chambers and Percy have observed in relation to patterns of employment:[11]

> The comparison of employment across the four western provinces indicates that differences between the provinces are also striking. Within the prairie provinces, agriculture's relative importance in Saskatchewan is more than twice as great as in Alberta and Manitoba. In all provinces the proportion of employment in the non-agricultural primary industry exceeds the national, more so in Alberta than the other three provinces because of the energy sector. While all four provinces have smaller shares of employment in manufacturing than the national average, manufacturing is relatively more important in B.C. and Manitoba.

Further, when one considers the export destinations of goods produced in the four western provinces, one is immediately aware of differences which may have significance for ultimate constitutional positions.

Current Dollar Exports of Goods by Destination in 1984[12]

	Interprovincial Trade	International Trade
Manitoba	59.2	40.8
Saskatchewan	35.4	64.6
Alberta	61.1	38.9
B.C.	23.2	76.8

Source: Unpublished Provincial Input-Output Data, Input-Output Division, Statistics Canada.

Manitoba and Alberta are much more dependent upon inter-provincial trade than either Saskatchewan and British Columbia and therefore may be more concerned with the effect of interprovincial trade barriers upon their ability to do business. In contrast, the economic well-being of British Columbia is largely dependent upon international trade, and in particular, trade with United States and the Pacific Rim. Indeed, trade with the Pacific Rim now represents approximately 40% of the province's total exports.[13] This diversification of markets will ultimately make B.C. less vulnerable to the vagaries of both the Canadian and U.S. economies and will probably ensure that B.C.'s constitutional concerns in relation to trade will have a particular international dimension.

It is important to keep in mind these kinds of differences between the four western provinces when predicting their ultimate constitutional positions. Reliable and accessible markets will ensure the economic well-being of the four provinces — however, the location, and relative importance of these markets, will vary among the provinces, as will their constitutional positions regarding topics such as economic union, trade policy, tariff barriers, etc. Chambers and Percy offer the following caution about the West:[14]

> ... despite the importance of natural resource and agricultural sectors in each of the Western provinces, significant economic diversity exists between them. These intra-regional differences are probably sufficiently large that many of the problems which currently confound federal-provincial relations would remain, and perhaps be even more serious for a grouping of western Canadian provinces. For example, the issue of regional disparities, the need for an equalization mechanism and of the possible conflicts between equity and efficiency would remain.

A further basis for distinction between the four provinces is the political ideology of the governments presently in power. Recent elections have returned New Democratic governments to power in Saskatchewan and British Columbia. As one might expect from social democratic governments, even moderate ones, such as those in Saskatchewan and British Columbia, their rhetoric speaks of concern for the powerless and the disadvantaged and the necessity to redistribute wealth to ensure that these people share in what is generally a very high standard of living enjoyed by most Canadians. This is not the rhetoric of the present Conservative government of Alberta and it is unclear, at this point, what the formal position of the Conservative government of Manitoba will be. However, if one looks to the Manitoba Constitutional Task Force, one sees a much greater concern with issues of social welfare than one does in Alberta. I presume that these expressed concerns with the powerless and the disadvantaged will lead to a somewhat different constitutional agenda than that which is being proposed by Alberta. Indeed, while neither Premiers Romanow or Harcourt have embraced Premier Rae's notion of a "social charter", it is my sense that, by whatever name, we will see a greater infusion of social welfare issues into the present constitutional debate than we have so far.[15]

In addition, the New Democratic governments of British Columbia and Saskatchewan appear to have a much stronger commitment to aboriginal self-government than does, at least, Alberta.[16] In the case of British Columbia, this is a remarkable reversal of position — considering that the Social Credit government of Premier Bill Vander Zalm consistently refused to recognize Aboriginal claims to self-government. The degree of commitment to the inclusion, and definition, of the right to aboriginal self-government in this constitutional round will probably prove to be yet another point of distinction between the four western provinces.

BRITISH COLUMBIA — CANADA'S FIFTH REGION?

I will briefly outline a few facts which might support the recognition of British Columbia as a fifth region in Canada, a position the province has asserted for sometime. British Columbia is to a large extent geographically isolated from the rest of Canada, due to the presence of the Rocky Mountains. In addition, of the four western provinces, it is the only maritime province. While it is true that Manitoba has a small sea coast on the Hudson Bay and one port at Churchill, this hardly qualifies Manitoba as a maritime power. British Columbia, on the other hand, is a province defined, to a large extent, by the ocean. British Columbia views its relationship with other Pacific Rim nations as crucial to its economic survival.[17] In addition, if one considers some of the areas of constitutional concern which have been identified by the province as important to its development and prosperity, one appreciates their uniqueness; fisheries, ocean oil tanker regulation, offshore resources, law of the sea issues, maritime boundaries, harbour development and ocean shipping.[18] British Columbia's main trading partners are Pacific Rim nations and the United States; therefore, its concerns in relation to international trade policies and tariff barriers will to some extent be different from those of the other three western provinces.

It should also be kept in mind that the population of British Columbia is growing at twice the national average, a fact which merely exacerbates its resentment at what it sees as a lack of equitable representation in our federal institutions. However, unlike the Smith Report, which points to B.C.'s leadership role in calling for the reform of the country's central institutions[19] and which calls for a

reformed Senate, the present New Democratic government has recently announced that it will not support the concept of a Triple-E Senate. The Government appears to believe that the province's long term interests can be better served by gaining additional legislative powers and not through reformed a Senate.

In summary, I believe that a reasonably convincing argument can be made for viewing British Columbia as a distinct region of Canada and one that can rightly argue that it has little in common with its three prairie neighbours.

SIMILARITIES

In spite of the points of difference outlined above that exist between the four western provinces, there are important similarities. The most important of these is an intense feeling of alienation and exclusion from federal institutions of government, be it Parliament, the Cabinet, the S.C.C. or regulatory boards and agencies, such as the C.T.C., C.R.T.C., N.E.B. and the National Harbours Board. For example, Smith reported that in a 1988-89 study of 31 major federal boards and commissions, only 7% of their membership (directors) came from British Columbia.[20] The four western provinces share a sense of being a "hinterland", possessing only limited influence over decision-makers in Ottawa. This sense of alienation and lack of effective voice have been heightened by certain notable events, which have taken on almost "mythic" proportions.[21] I offer, as examples, the National Energy Policy, a policy of the Trudeau Liberal government of the early '80s which stripped the western oil and gas producing provinces of significant revenues from, and control over, their natural resources; and the apparently blatant politicization of the process by which federal government contracts, such as the CF-18, are awarded.

The primary constitutional reform that has been proposed to overcome these feelings of alienation and exclusion is that of Senate reform and in particular, a Triple-E Senate. This is a position strongly endorsed by the government of Alberta. However, support for this model in the three other western provinces is more difficult to gauge. There does not appear to be strong support for the notion of a Senate, made up of equal numbers of Senators from each province, other than in Alberta. The Manitoba Constitutional Task Force calls for equitable representation, as did the Smith Report. As mentioned above, British Columbia appears to no longer have any particular interest in Senate reform and the government of Saskatchewan, while not yet indicating its position, is unlikely to demand equality in representation. There is greater general support for the concept of an effective and elected Senate. But with British Columbia's recent decision to forsake Senate reform, it is no longer realistic to suggest (if it ever was) that Senate reform is the paramount constitutional demand of the West.

Further, during the '70s, there were a number of significant Supreme Court of Canada decisions in which the western provinces felt that the Court reflected an unacceptable centralist bias. Two of these cases, *CIGOL*[22] and *Central Canada Potash*,[23] placed significant limitations upon the ability of resource-producing provinces to regulate those resources in the inter-provincial and international markets. These defeats, probably felt most profoundly by Alberta and Saskatchewan, led even ordinarily reasonable and level-headed politicians, like then Premier Alan Blakeney of Saskatchewan, to suggest that the Supreme Court was biased in favour of the federal government.[24]

While the concerns of the western provinces, at least in relation to the development and exploitation of their natural resources, were accommodated to some extent by the inclusion of section 92.A in the *Constitution Act, 1982*, there is still strong support for some provincial involvement in the selection of Supreme Court of Canada justices. For example, the Meech Lake accord, which would have required the federal government to select Supreme Court justices from lists provided by the provinces, was seen in the West as an important first step in ensuring provincial "input" in the make-up of this important federal institution. However, such participation in the appointment process is a far cry from the proposal put forth by the Smith Report, in which the author recommends that the Supreme Court should have ten members and that the make-up of the Court at all times should be representative of the five regions of Canada, those regions being the Atlantic, Québec, Ontario, the Prairies and British Columbia.[25]

A further irritant for many in the West is the continued reference to the concept of duality in Canadian constitutional law, referring to the English and the French. Westerners will concede that in 1867, two founding peoples was the socio-political reality. What they find more difficult to accept, in 1991, is that the concept should continue to be a controlling constitutional principle. The reality of the West is that of a region in which only 35% of the population identify their ethnic origin as English or French.[26] Westerners are suspicious of any constitutional proposal that appears to give "special status" to one ethnic group over others. This suspicion is translated into ambivalence, if not hostility, toward any form of distinct society clause. During the Meech Lake debate, it became clear that even the possibility of Québec gaining special powers to preserve and promote its distinctiveness was unacceptable to the majority of westerners. Interestingly, however, the premiers of British Columbia, Alberta, and Saskatchewan supported the Meech Lake Accord throughout, with the Premier of Manitoba being the only dissident. However,

in this constitutional round, Premier Getty of Alberta appears to be resiling from his support for the inclusion of a distinct society clause, while his fellow western premiers appear to be much more receptive to the idea. While the principle of "provincial equality" is still an important demand from the government of Alberta, it appears to have less resonance with the governments of British Columbia, Saskatchewan and Manitoba.

CONCLUSION

Obviously, there are important historic and economic similarities among the four western provinces. Further, they share strong feelings of alienation and exclusion from federal institutions. However, on balance, it is my opinion that the differences between the four western provinces outweigh these similarities, thereby making it very difficult and perhaps, even futile, to suggest that there is a "western position" in relation to constitutional reform. The agendas of the four western provinces reflect there should be no expectation that they will speak with one voice in the ongoing constitutional reform process. Indeed, it is my opinion that the differences outlined above will become more pronounced over the coming months, thereby further adding to the array of constitutional "bottom lines" upon which compromise will be required.

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1. Comments presented at the Association for Canadian Studies in the United States, 20th Anniversary Conference, Boston, November 22, 1991.
2. This comment does not ignore the involvement of Premier Blakeney and his government in constitutional affairs during this time. It is simply to reflect my opinion that the dominant player of the time was the Premier of Alberta.
3. On a related point, Roger Smith has documented the disparity in fiscal capacity of the Western provinces. He makes the point that although tax bases are similar for all major taxes and rates are similar, this does not provide for equal fiscal residuals. "At similar levels of local and provincial taxes, in 1982 Alberta could have supported a percapita level of expenditure that was 2.8 times that in Manitoba, and double that in Saskatchewan and British Columbia. Fiscal capacity in Saskatchewan and British Columbia was 40% that in Manitoba. These disparities fell sharply with the fallen energy prices, but remain substantial. By fiscal 1992, fiscal capacity in Alberta was still nearly 1.7 times that in Manitoba." See: Smith, Roger "Constitutional Reform and the Structure of Government: Fiscal Residuals in the West - A Reason for Getting Together", The Economics of Constitutional Change Series, Article No. 2 - June 1991.
4. Report of the Manitoba Constitutional Task Force, October 28, 1991 at 8.
5. *Ibid.* at 40-41.
6. A Québec Free to Choose, Report of the Constitutional Committee of the Québec Liberal Party, January 28, 1991.
7. As reported in the Globe and Mail, Tuesday, November 12, 1991.
8. *Ibid.*
9. Chambers and Percy, "Natural Resources and the Western Canadian Economy: Implications for Constitutional Change", The Economics of Constitutional Change Series, Article No. 5/June 1991. These percentages are compiled from Table 2: Leading 5 Commodity Exports by Province as a Percent of Total Exports.
10. Boothe, Paul, "The Economics of Association: A Regional Approach to Constitutional Design" Research Paper No. 91-11 (A paper prepared for the C.D. Howe Conference on Constitutional Futures, Toronto, November, 1990).
11. *Ibid.* at 4.
12. Canadian Federalism and Economic Union Partnership for Prosperity (Minister of Supply and Services, Ottawa, 1991) at 10.
13. Smith, Melvin, H. Q.C., *The Renewal of the Federation, A British Columbia Perspective* (May, 1991) at 3-4.
14. *Ibid.* at 12.
15. Together with Ontario, these governments now represent over 52% of the population of Canada. As a result, these three provinces may become a potent force in any future constitutional reform, in that, our amendment formula requires the agreement of seven provinces representing 50% of the population. If the provinces of Saskatchewan, British Columbia and Ontario were to agree on the nature of the fundamental constitutional change they wish to see take place, they could prevent any proposed change not in keeping with their vision.
16. The Manitoba Task Force also calls for the recognition of the inherent right of aboriginal peoples to self-government.
17. *Supra*, note 13 at 3-4.
18. *Ibid.*
19. *Ibid.* at 7.
20. Premier's Office, (Intergovernmental Relations) An Analysis of B.C. Representation on Major Federal Crown Corporations and Boards, F.Y. 1988-89, (January, 1990) as reported in Smith, *Ibid.* at 63.
21. See, for example, the draft speaking notes of I.H. Asper, Q.C., as presented at the Canada West Conference — Alternatives 1991, Banff Springs Hotel, September 27, 1991 in which he refers to the NEP as "fiscal rape".
22. [1978] 2 S.C.R. 545
23. [1979] 1 S.C.R. 42
24. This expressed concern with bias was dealt with by Peter Hogg in an article entitled "Is The Supreme Court of Canada Biased in Constitution Cases?" (1979) 57 C.B.R. 721 in which Professor Hogg concluded there was no evidence of centralist bias.
25. *Supra*, note 14 at 62.
26. *Supra*, note 10, Figure 2, Ethnic Origin.